

R E P O R T S
O F
C A S E S
A R G U E D a n d A D J U D G E D
I N T H E
King's Courts at Westminster,

In T W O P A R T S.

PART I. Containing CASES in the Court of KING's BENCH, &c. beginning in HILARY TERM in the 16th Year of the Reign of KING GEORGE the Second, and ending in HILARY TERM in the 26th.

PART II. Containing CASES in the Court of COMMON PLEAS, &c. beginning in HILARY TERM in the 26th Year of the Reign of KING GEORGE the Second, and ending in TRINITY TERM in the 9th Year of the Reign of his present Majesty KING GEORGE the Third.

By GEORGE WILSON, Serjeant at Law.
W.

WITH TABLES of the PRINCIPAL MATTERS, Names of the CASES contained in both Parts; and some Accounts of the Lords the Judges, Serjeants at Law, and most eminent Counsel attending the Bar during that Time.

The SECOND EDITION, corrected.

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M DCC LXXIX.



A
T A B L E
OF THE
N A M E S of the C A S E S,
C O N T A I N E D

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A TABLE of the Names of the *Judges*,
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the Years when these CASES were
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IN CHANCERY.

HILARY TERM 16 *Geo.* 2. 1742. O. S. *Philip* Lord *Hardwicke* Baron of *Hardwicke* in the county of *Gloucester* was Chancellor, and continued so until *Michaelmas Term* 30 *Geo.* 2. On the 19th of *November* 1756, he resigned the Great seal, which was the same day given in commission to Sir *John Willes* Knight, Lord Chief Justice of the Common Bench, Sir *Sydney Stafford Smythe* Knight a Baron of the Exchequer, and Sir *John Eardly Wilmot* Knight a Judge of the King's Bench.

On *Thursday June* the 30th 1757, being the very next day after *Trinity Term* 30 & 31 *Geo.* 2. the above Lords Commissioners resigned the Great seal, which at the same time was delivered by the King to Sir *Robert Henley* Knight, his attorney general who was appointed *Lord Keeper* thereof.

In the beginning of the year 1760. the Lord Keeper *Henley* was created a peer by the stile and title of *Robert* Lord *Henley*, Baron of *Grainge*, in the county of *Southampton*, and appointed Lord High Steward of England, before whom and his peers, on the 16th and 17th of *April* 1760. *Lawrence* earl of *Ferrers* was tried and found guilty of murder *nem. con.* and on *Friday* the 18th received sentence to be hanged on *Monday* following, and to be anatomized; but was respited till *May* the 6th following, when he was hanged at *Tyburn*.

King *George* the 2d. died at *Kensington*, *October* 25th 1760.

A few days before *Hilary Term* 1 *Geo.* 3. 1761. the Lord Keeper *Henley* delivered the Great seal to the young King, who immediately re-delivered it to him by the stile of *Lord Chancellor*; and some time after he was created Earl of *Northington*, and about the same time the patents of all the 12 Judges were renewed by King *Geo.* the 3d.

In the vacation after *Trinity Term* 6 *Geo.* 3. 1766. the earl of *Northington* resigned the Great seal, which at the same time was delivered to *Charles* lord *Camden*, baron of *Camden-place*, in the county of *Kent*, Lord Chief Justice of the court of common Bench, by the stile of Lord Chancellor, who at the time of publishing these Cases, presides in the high court of chancery with great dignity.

A TABLE of the Judges, &c.

Hilary Term 16 Geo. 2. 1742. William Fortescue, Esq; Master of the rolls, continued so until he died in 1749; Sir John Strange, immediately succeeded him, and continued Master of the rolls till he died in Trinity Term 27 & 28 Geo. 2. 1754. Sir Thomas Clarke Knight, immediately succeeded him, and continued Master of the rolls till he died in Michaelmas Term 4 Geo. 3. 1763. and in Hilary Term following Sir Thomas Sewell Knight succeeded him, and is now Master of the rolls.

JUSTICES of the KING'S BENCH.

Hilary Term 16 Geo. 2. 1742. O. S. Sir William Lee Knight, Lord Chief Justice, Sir William Chapple Knight, Martin Wright Esq; and Thomas Denison Esq; justices.

In Hilary vacation 1744-5. O. S. Mr. Justice Chapple died, and Sir Michael Foster Knight, Serjeant at law, recorder of Bristol was made Justice of the King's Bench in his room, in the following term.

Sir William Lee Knight, Lord Chief Justice died in Hilary vacation 1754, and on the 2d of May 1754, Sir Dudley Rider knight, the King's attorney general was made a Serjeant at law, and Lord Chief Justice B. R. in his room.

In Hilary Term 28 Geo. 2. 1755. Sir Martin Wright Knight, the Senior Puisne judge resigned, by reason of a weakness in his eyes, and had a pension granted to him for his faithful service; and on the 11th of February Sir John Eardly Wilmot Knight, an eminent barrister was called to the degree of Serjeant at law, made a Judge of B. R. and next day took his seat in court.

On Tuesday the 25th of May in Easter Term 29 Geo. 2. 1756. Sir Dudley Rider Knight, Chief Justice of B. R. died at his house in Chancery Lane: in Trinity Term following (there being no Chief Justice appointed) Mr. justice Denison presided with great ability, and the business of the court was well dispatched.

On Monday November the 8th 1756. in Michaelmas Term 30 Geo. 2. The honourable William Murray Esq; the king's attorney general was called to the degree of Serjeant at law, and the same day was created a peer by the stile and title of of William Lord Mansfield Baron of Mansfield, in the county of Nottingham, appointed Chief Justice B. R. and took his place in court the 11th of the same month.

On Monday the 7th of November 1763. the first day of Michaelmas Term 4 Geo. 3. Sir Michael Foster died, in Hilary Term following

A TABLE of the Judges, &c.

ing Sir *Joseph Yates* Knight, an eminent barraster was called to the degree of Serjeant at law, and made a judge of *B. R.* in the room of Mr. Justice *Foster*.

In *Easter Term* 5 *Geo.* 3. 1765. Sir *Thomas Denison* Knight, the *Senior Puisne* Judge resigned by reason of age and infirmities, and had a pension granted to him for his long and faithful service; in the same term Sir *Richard Ashton* Knight, Lord Chief Justice of the Common Pleas in *Ireland*, was called to the degree of Serjeant at law, and made a judge of *B. R.* in his room.

Towards the latter end of the vacation after *Trinity Term* 6 *Geo.* 3. 1766. Sir *John Eardley Wilmot* Knight, a Judge of *B. R.* was appointed Lord Chief Justice of the court of Common Bench, in the room of Lord *Camden* promoted to the Great seal; and *James Hewitt* Serjeant at law was made a judge of *B. R.* in the room of Mr. Justice *Wilmot*.

In *December* 1767. *James Hewitt* Esq; a judge of the King's Bench was appointed Lord chancellor of *Ireland*, and created a peer of that kingdom by the title of baron *Lifford*.

January 27th 1768. *Hilary Term* 8 *Geo.* 3. *Edward Willes* Esq; the King's solicitor general, second son of the late Lord Chief Justice *Willes*, was made a serjeant at law, and a judge of *B. R.* in the room of Mr. justice *Hewitt*, now Lord Chancellor of *Ireland*.

The judges of the King's Bench at the time of publishing these *Cases* are—*William* lord *Mansfield* Chief Justice, Sir *Joseph Yates*, Sir *Richard Ashton*, and *Edward Willes* Esq; justices.

JUSTICES of the COMMON BENCH.

Hilary Term 16 *G.* 2. 1742. O. S. Sir *John Willes* Knight, Lord Chief Justice, Sir *John Fortescue Aland* Knight, Sir *Thomas Abney* Knight, and *Thomas Burnett* Esq; justices.

In *Trinity Term* 19 & 20 *Geo.* 2. 1746. Mr. justice *Fortescue* resigned, and Sir *Thomas Birch* Knight, Serjeant at law was made a judge in his room.

Mr. justice *Abney* died about the latter end of *Easter Term*, 23 *Geo.* 2. 1750. and in *Trinity Term* following *Nathaniel Gandy* Esq; an eminent barraster was made a Serjeant, and a judge of the *C. B.* in his room.

Mr. justice *Burnett* died about the 6th of *January* 1763. N. S. and Sir *Edward Clive* Knight, a baron of the exchequer in *Hilary Term* following was made a judge of the *C. B.* in his room.

Mr.

A TABLE of the Judges, &c.

Mr. Justice Gundry died in *Hilary* vacation 27 Geo. 2. 1754. upon the *Western* circuit, and on the 2d of May 1754. in *Easter Term* 27 Geo. 2. The honourable Henry Batburst Esq; one of his Majesty's learned counsel, was made a Serjeant at law, a judge, of the C. B. and took his seat in court May the 6th 1754.

Mr. justice Birch died March the 14th 1757. and in *Easter Term* next following the honourable William Noel Esq; one of his Majesty's learned counsel was made a Serjeant at law, and a judge of the C. B. in his room.

On Tuesday December the 15th 1761. Lord Chief Justice Willes died about one o'Clock in the morning, at his house in *Bloomsbury Square*; on the first day of *Hilary Term* 2 Geo. 3. 1762. Sir Charles Pratt, the King's attorney general, was made a Serjeant at law appointed Lord Chief Justice of the C. B. and took his place in court on Monday the 25th of January 1762.

On the 24th of January 1763. in *Hilary Term* 3 Geo. 3. Sir Henry Gould Knight, one of the Barons of the Exchequer, having lately been appointed a judge of the C. B. took his place in court.

In the vacation after *Trinity Term* 5 Geo. 3. 1765. the right honourable Sir Charles Pratt, Lord Chief Justice of the C. B. was created a peer of the realm by the style and title of Charles Lord Camden, Baron of Camden-place in the county of Kent.

In the vacation after *Trinity Term* 1766. the honourable Sir John Eardley Wilmot Knight, one of the judges of the King's Bench, was appointed Lord Chief Justice of the C. B. (in the room of Lord Camden) and took his seat in court in *Michaelmas Term* the 7th of Geo. 3.

The judges of the Common Bench at the time of publishing these Cases are, Sir John Eardley Wilmot Knight, Lord Chief Justice, Sir Edward Clive Knight, the honourable Henry Batburst Esq; and Sir Henry Gould Knight, justices.

BARONS of the EXCHEQUER.

Hilary Term 16 Geo. 2. 1742. O. S. Sir Thomas Parker Knight, Lord Chief Baron, Sir Lawrence Carter Knight, John Reynolds Esq; and Charles Clarke Esq; barons.

In *Hilary* vacation 1744. O. S. Mr. Baron Carter died, and in *Easter Term* 18 Geo. 2. 1745. Edward Clive Esq; a learned barrister was made a Serjeant at law, and a Baron.

In *Easter Term* 1747. Mr. Baron Reynolds died, and the honourable Heneage Legge Esq; was made a Serjeant at law, and a Baron in *Trinity Term* 21 Geo. 2. 1747. In

A TABLE of the Judges, &c.

In *Easter Term* 23 *Geo.* 2. 1750. Mr. Baron *Clarke* died, and in *Trinity Term* 24 *Geo.* 2. 1750. *Sidney Stafford Smythe* Esq; one of the King's learned counsel was made a Serjeant at law, and a Baron.

On the 3d of *February* in *Hilary Term* 26 *Geo.* 2. 1753. N. S. Sir *Richard Adams* Knight, Recorder of *London*, was made a Serjeant at law, and a Baron of the Exchequer, in the room of Mr. Baron *Clive*, who was removed to the Common Bench.

In *Trinity* vacation 32 & 33 *Geo.* 2. 1759. Mr. Baron *Legge* died at *Bripel*; and in *Michaelmas Term* following Sir *Richard Loyd* Knight, was made a Serjeant at law, and Baron of the Exchequer.

In *Trinity* vacation 1 *Geo.* 3. 1761. Mr. Baron *Lloyd* died, (at *Northallerton* in *Yorkshire*, in his return from *Newcastle*, where he had been to try some rebels against the *Militia*) and in *Michaelmas Term* following, Sir *Henry Gould* Knight, one of his Majesty's learned counsel, was made a Baron of the Exchequer.

In *Hilary Term* 3 *Geo.* 3. 1763. *George Perrott* Esq; one of his Majesty's learned counsel was made a Serjeant at law, and a Baron of the Exchequer, in the room of Mr. Baron *Gould*, who was removed to the Common Bench.

The Barons of the Exchequer, at the time of publishing these Reports are, Sir *Thomas Parker* Knight, Lord Chief Baron, Sir *Sidney Stafford Smythe* Knight, Sir *Richard Adams* Knight, and *George Perrott* Esq; Barons.

Some Account of the most eminent COUNSEL at the BAR, in
the Years when these CASES were adjudged.

HILARY TERM 16 Geo. 2. 1742.

MATTHEW Skinner, the King's first Serjeant at law, Chief Justice of *Chester*.

Sir *Dudley Rider* Knight, the King's Attorney General.

The honourable *William Murray* Esq; the King's Solicitor General.

King's Serjeants at Law.

Samuel Prime, Thomas Birch, Edward Willes Attorney of the Dutchy.

Serjeants at Law.

John Belfield, Simon Urtin Recorder of London, *Thomas Hufsey, Abraham Gapper, William Wynne, John Agar, Richard Draper, William Hayward, Thomas Barnardiston, Edward Bootle, Edward Leeds, William Eyre.*

King's Counsel extraordinary.

Thomas Bootle Chancellor to the Prince of Wales.

William Pauncefort Attorney General to the Prince.

The hon. *Alexander Hume Campbel*, Solicitor General to the Prince.

John Brown, William Noel, Thomas Clarke, John Strange, Richard Loyd, Heneage Legg, Nathaniel Gundry.

In Hilary Term 19 Geo. 2. 1745. O. S. the honourable *Henry Bathurst* was made King's counsel, and Solicitor General to the Prince of Wales in the room of *Alexander Hume Campbel*.

Trinity Term 21 Geo. 2. *Henry Banks, Sidney Stafford Smythe*, made King's counsel: Leeds the King's Serjeant: and on the 23d of June 1747. *David Peole* was made a Serjeant.

Michaelmas Term 23 Geo. 2. 1749.

Skinner, the King's first Serjeant died, and Sir *Samuel Prime* Knight, then was the King's first Serjeant

In Trinity vacation 24 & 25 Geo. 2. 1751. Serjeant *Belfield* was overturned in his chariot upon the *Western* circuit and was so much hurt that he died in 24 hours afterwards, having gone that circuit above 120 times, *ut audiui*.

In Michaelmas Term 25 Geo. 2. 1751, *Robert Henley* Esq; recorder of Bath, was made King's counsel.

In the vacation after Trinity Term 1752. Serjeant *Barnardiston* died. Sir *Thomas Bootle* Chancellor to the late Prince of Wales, died at Oxford, in the year 1753.

February 3d 1753. the Reporter was made Serjeant at law.

Serjeant *Agar* died the 7th of January 1754.

In Hilary vacation 27 Geo. 2. 1754. *Henry Gould, Charles Pratt, Fletcher Norton, Thomas Sewell*, and the honourable *Charles Yorke* were made King's counsel.

In Easter Term 27 Geo. 2. 1754. the honourable *William Murray* was made Attorney General, and Sir *Richard Loyd* Solicitor General to the King.

February 11th 1755. Hilary Term 28 Geo. 2. *Lomax Martin, James Hewitt*, and *William Davy* were made Serjeants at law: and about this time Serjeant *Draper* died, and Serjeant *Leeds* left the bar.

In October 1756, Sir *Robert Henley* was made Attorney General, and the honourable *Charles Yorke* Solicitor General to the King.

November

Some Account of the most eminent Counsel.

November 11th 1756. Edward Willes Esq; made King's counsel, and this day took his place within the bar.

March 7th 1757. Serjeant Willes was appointed Lord Chief Baron of the Exchequer in Ireland.

May 3d 1757. Thomas Stanyforth and James Forster were made Serjeants at law, and the same day Serjeant Poole was sworn King's Serjeant, and *George Perrott* King's counsel.

Easter Term 31 Geo. 3. Eliab Harvey made King's counsel.

Trinity Term 1758. Sir Samuel Prime Knight, the King's first Serjeant retired from the bar, where he had long practiced in full business to the last, with the greatest honour and ability.

In *Trinity vacation 1758. Serjeant Martin* died.

In *Michaelmas vacation 1758. Serjeant Leeds* died, Serjeant *Hewitt* made King's Serjeant soon afterwards.

February the 6th 1759. William Whitaker, George Nares, and Anthony Keck made Serjeants at law, the two first went out King's Serjeants.

Serjeants at law and King's Counsel in *Hilary Term 32 Geo. 2. 1759.*

Sir Samuel Prime Knight, the King's first Serjeant (retired.)

Sir Charles Pratt Attorney General to the King.

The honourable *Charles Yorke*, Solicitor General to the King.

King's Serjeants at law.

David Poole, James Hewitt, William Whitaker, George Nares.

King's Counsel.

Richard Loyd, Richard Aston, Henry Gould, Edward Willes, Thomas

Sewell, William De Grey, Fletcher Norton, George Perrott, John Morton, Eliab Harvey.

Serjeants at Law.

William Wynne, William Hayward George Wilson, William Davy, Thomas Stanyforth, James Foster.

Michaelmas Term 2 Geo. 3. 1761.

Dr. William Blackiston and Charles Ambler, lately made King's counsel.

Saturday November 7th 1761. Joseph Sayer made a Serjeant.

January 23d 1762. John Burland made a Serjeant at law.

Richard Hufsey, Edward Thurloe, Webb lately made King's counsel.

On *Friday October 29th 1762. Serjeant Poole* died at Bath, whither he had retired ever since last *Hilary Term.*

In *Michaelmas vacation 1762. Serjeant Davy* was made King's Serjeant.

In *Hilary Term 3 Geo. 3. 1763. John Aspinall, and John Glynn* made Serjeants at law.

John Morton King's counsel, appointed Chief Justice of *Chester.*

Serjeant *Hayward* died about this time in *Shropshire.*

Alexander Wedderburn made King's counsel about this time.

Mr. York the Attorney General resigned a little before *Michaelmas Term 4 Geo. 3. 1763.*

Hilary Term 4 Geo. 3. 1764. Serjeant Hewitt voluntarily resigned his patent to King's Serjeant; *Sir Fletcher Norton* being some time before Solicitor General, was about this time made Attorney General, and *William De Grey* Solicitor General to the King.

May 2d 1764. Serjeant Burland made King's Serjeant, and *Richard Clayton* King's counsel.

In *Hilary vacation 5 Geo. 3. 1765. Serjeant William Eyre* died in *Queen's Square,*

Some Account of the most eminent Counsel.

Square, in the parish of St. George the Martyr.

April 24th Easter Term 5 Geo. 3. 1765, Richard Leigh, and William Jephson made Serjeants at law.

In Trinity vacation 5 Geo. 3. 1765. the honourable Mr. Yorke again made Attorney General, in the room of Sir Fletcher Norton, who still continues the King's counsel.

Some time afterwards Mr. Yorke again resigned, and William De Grey was made Attorney General, and Edward Wille Solicitor General.

In Hilary Term 8 Geo. 3. 1768. John Dunning was made the King's Solicitor General.

Hilary vacation 1769. James Wallace made King's counsel.

The Lord Chancellor, Judges, Serjeants at law, and King's Counsel, at the Time of publishing these Cases.

Charles Lord Camden Chancellor.

William Lord Mansfield, Chief Justice B. R.

Sir Thomas Sewell Knight, Master of the Rolls.

Sir John Eardly Wilmot Knight, Lord Chief Justice C. B.

Sir Thomas Parker Knight, Lord Chief Baron of the Exchequer.

Sir Edward Clive Knight, Justice C. B.

Sir S. S. Smythe Knight, Baron of the Exchequer.

Sir Richard Adams Knight, Baron of the Exchequer.

The honourable Henry Bathurst Esq; Justice C. B.

Sir Henry Gould Knight; Justice C. B. George Perrott Esq; Baron of the Exchequer.

Sir Joseph Yates Knight, Justice B. R.

Sir Richard Aston Knight, Justice B. R.

Edward Wille Esq; Justice B. R.

William Whitaker first Serjeant to the King

William De Grey Attorney General.

John Dunning Solicitor General.

Sir Samuel Prime Knight, the late King's most ancient Serjeant retired.

King's Serjeants.

George Nares, William Davy, John Burland.

Serjeants.

George Wilson, James Forster, Joseph Sayer, John Aspinall (retired.) John Glynn, Richard Leigh, William Jephson and Anthony Keck (retired.)

King's Counsel.

Sir Fletcher Norton made Chief Justice in Eyre, and retired from the bar last Hilary Term.

John Morton, Richard Hussey, Charles Ambler, William Blackstone, Edward Thurloe, Alexander Wedderburn, James Wallace.

Eliab Harvey died in the vacation after Trinity Term 9 Geo. 3. 1769.

Hilary

Hilary Term

16 Geo. 2. 1742.

Morris *versus* Barry. B. R. In Error.

ERROR in ejectment from *Ireland*; the declaration sets forth, that *Hen. Murry, Esq;* on the 3d day of *March* 1740. at *Drum* in the county of *Tipperary*, did demise one castle, 50 messuages, &c. *cum pertin'* to the plaintiff, *habendum* to plaintiff from the said 3d day of *March* for eleven years from thence next ensuing, and also that *Lady Middleton* on the same day and year demised the same premises to the plaintiff, *habendum* for the same term; by virtue of which said demises, plaintiff entred and was possessed until the defendant ejected him; upon Not guilty a verdict was found for the plaintiff; and the entry of the judgment was, that the plaintiff do recover his *said terms* (in the plural number) of and in the said tenements, &c.

1 Ad. Hll. 750

If by any intendment a judgment in ejectment after a verdict can be made good, the court will do it.
2 Stra. 1180, S. C.

And now upon the common errors assigned, *Bootle* serjeant, argued for the defendant in the original cause, that this judgment was erroneous; 1st, Because *as* both the demises are of the same date, of the same lands, and for the same term, both the lessors could not have title at the same time, and therefore the plaintiff below could not enter by virtue of both demises, so that upon his own shewing in his declaration he cannot have a right to recover both the terms. 2^{dly}, That no intendment whatever could make this good.

Farrelley 148, Hart and Longfield, Hil. 4. Annæ Non prof. entred as to all the demises but one, and that made it good.

Sir *John Strange* for the defendant in error insisted, that if by any means whatever this judgment could be helped, the court would do it; and he put this case to shew that the plaintiff might possibly have a title as laid in the declaration, *viz.* That if there be two jointenants, and one of them makes a lease of the whole land at one time, and the other makes a lease of the whole land at another time of the same day, the moiety of each jointenant will only pass; and in such case the plaintiff in this ejectment could not have declared more properly than he has done, he could not have declared upon a single demise. *Worrall and Beck, Mich, 3 Geo. 2.* In ejectment on two

PART I.

B

demises

demises of different lands laid so as to be two different demises, the judgment was, that plaintiff do recover his term; the objection was, that it should have said that plaintiff do recover his terms in the plural number; but the court in that case said they would extend the word *term* to his term in *A.* and his term in *B.* and accordingly judgment was for the plaintiff. Sir *J. Strange* took a distinction between the case at bar and that in *Farresley*, for that was a contract between the same persons, and so is not this.

Bootle serjeant said, that in *Mich.* — *Goodright ex dim' Griffith v.* — judgment was reversed, because the premises were laid to be in the said counties, or one of them.

C. J. Lee: If by any means whatever the plaintiff can be supposed to have a title as laid in the declaration, as this is after a verdict, we will hold this judgment right, and there is no inconsistency, but that two leases for the same term and of the same land may be good; for two jointenants in the case supposed by Sir *J. Strange*, each of them as they are seised *per mie & per tout*, may make a lease of the whole, although his moiety will only pass, and they will be several terms as they arise from the several interests of several persons, though they are the same in point of duration. My *Ld.* cited a case, *Trin.* 4 & 5 *G. 2.* *Fisher v. Hughes* in ejectment; upon three demises by several lessors of the same premises; as to two demises judgment was entred for plaintiff, as to the other demise it was entred for the defendant; the objection was, that there was judgment both for the plaintiff and defendant, but the court held the judgment right; this was by writ of error from the grand sessions in *Wales*.

Judgment affirmed by the whole court.

John Martin, of the demise of Thomas Tregonwell,
versus John Strachan and Luke Harrison. B. R.

2 Stra. 1179.
S. C.
Tenant in tail
by purchase
with rever-
sion in fee by
descent (both
ex parte ma-
terna) suffers
a recovery,
the old use is
gone, and it
descends to
his own right
heirs.

EJECTMENT for lands in *Milton* in the county of *Dorset*; Not guilty, special verdict found, upon which this question rises, *viz.* Whether the estate of which *Jacob Banks* died seised in fee shall descend to the lessor of the plaintiff as heir *ex parte materna*, because, unless there be a good title found for him upon this ground, the possession of the defendant is sufficient to intitle him to judgment.

The case is shortly this: *Jacob Banks*, tenant in tail by purchase under a marriage settlement made by his ancestor *ex parte materna* in 1680, with remainder in tail to *George Rooke* and — *Asst.*, with reversion in fee to himself by descent *ex parte materna* suffered a common recovery to the use of himself in fee, and died so seised without issue.

Now

Now the rule of descent is well known, if a man seised as heir by descent *ex parte maternâ* makes a feoffment in fee to the use of his own right heirs, it shall descend to his heir *ex parte maternâ*. *Co. Lit.* 13. 3 *Lev.* 406. and it will be the same if he suffer a common recovery to the use of his own right heirs, as is laid down in the case of *Abbot and Burton*, *Salk.* 590. but this rule only holds where the persons take by descent; in the present case *J. Banks* the tenant in tail took the estate by purchase *per formam doni*, viz. by the limitation in the marriage settlement; and this estate-tail preceded the remainder in tail to *Rooke and Ash*, and the reversion in fee, which was in himself; therefore the point is, whether the tenant in tail by purchase who suffered a recovery to the use of himself in fee is to be considered in the same manner as if he took an original estate in fee *ex parte maternâ* by descent.

After considering the nature of estates-tail before the *stat. de donis*, and since, and the operation of common recoveries, the court resolved that in the case at bar by virtue of the common recovery *Jacob Banks* gained a new estate in fee to him and his heirs general, and thereupon judgment was given for the defendant: error upon this judgment was brought in *domo procerum*, and the 17th of April 1744. *Willes C.* Justice delivered the unanimous opinion of all the Judges in favour of the defendant *Strachan*, and judgment was accordingly affirmed. *Post. 66*

*vide S. J. R. 167. a.
a full Act of 10th
of the case*

Sercole versus Hanson, Bart. B. R.

WRIT of error was brought to reverse an outlawry in an Outlawry. action for a debt of 400*l.* and the error assigned was that the party outlawed was beyond sea at the time of the *exigent* awarded; and now serjeant *Draper* moved that the outlawry might be reversed upon filing common bail, for that no affidavit was made and filed according to the statute of the 12th of *Geo.* 1. nor no writing or indorsement of any sum on the back of the writ, and therefore if the sheriff could have found the defendant, he could not have arrested him by virtue of such process, but only could have served a copy of it upon him. *Special bail is required upon reversing an outlawry.* *2 Stra. 1173. S. C.*

Mr. Lacy contra insisted that the party outlawed ought to put in special bail before the outlawry be reversed; as the law stood before the statute of *W. & M.* every defendant outlawed was to appear in person before such outlawry could be reversed, and such appearance was a commitment in custody, viz. he was to be in prison to answer the plaintiff's action, *Shep. Epitome* 1079, in cases of pardons of outlawry if after judgment he must pay the debt, if before judgment

ment he must yield his body to prison, &c. and the reason in pardons of outlawry and in reversals of outlawry is the same, *Lit. Rep.* 301. *Salk.* 496. *Carth.* 459. *Matthews v.* — there, (though the defendant never was in *England*) the court would not reverse the outlawry, but put him to bring error and put in bail, and there is a note at the bottom of that case, that this is an excellent way to get bail of a foreigner, *Cases in King Wms. time* 549. *Wilbram* and — *Trin.* 1701. in error to reverse an outlawry in *C. B.* upon the reversal of the outlawry it was resolved that the defendant should put in special bail if the action required it; if the court in the case at bar do not oblige the defendant to give special bail, defendant being abroad, the plaintiff will lose his debt which is 400*l.* of which we have an affidavit now, though there was none at the time of suing out the first process.

Draper replied, that before the statute of *Eliz.* outlawry would not lie only in actions of trespass *vi & armis*; want of proclamation was error at common law; the case in *Salk.* 496. is in point with us.

31 *Eliz.* c. 3.
f. 3.

C. J. Lee: By the statute of *Eliz.* the bail is to pay the condemnation money. *Salk.* 496. is an express case in point that special bail shall be given where the action isailable; in *Martin and Duckitt*, *Trin.* 6 *G.* 2. and *Wall and Wotton*, *Pas.* 12 *G.* 1. there was special bail in both these cases upon error to reverse the outlawries; and in the case at bar the defendant in *Easter* term following put in bail special, and the outlawry was accordingly reversed.

Lyddall & al' Executors of Metcalf *versus* Dunlapp & al' Executors of Felton.

Whether
plene admi-
nistravit be a
good plea in
covenant a-
gainst execu-
tors where
the breach is
for non pay-
ment of rent
incurred in
their own
time.

ACTION of covenant, the breach was assigned for non-payment of rent incurred in the defendant's own time, *plene administravit*, and general demurrer to the plea; the question was, whether this was a good plea, and Mr. *Lawson* against the plea cited 5 *Rep.* 31. *Popham* 120. 1 *Vent.* 271. 1 *Bulst.* 22. 1 *Mod.* 185. *Salk.* 297. 316, 17. Mr. *Poole* in support of the plea, said that this question depends upon what judgment the court can give upon this plea, and the plaintiff here can only have judgment *de bonis testatoris*, *Rol. Abr.* 931. p. 8. *Dyer* 324. *Cro. Jac.* 671. *Hob.* 188. 1 *Saund.* 112, if judgment can only be given *de bonis testatoris*, then *plene administravit* will be a good plea, as a temporary bar; all the cases cited by Mr. *Lawson* are in actions of debt, and the case in *Salk.* 316. is with the defendant, he admitted that the plaintiff might have brought his action against defendants as assignees of the term in debt both in the *debet & detinet*, and that in such case the defendants

defendants would be chargeable *de bonis propriis* without naming them executors.

C. J. Lee: None of the cases cited by Mr. *Lawson* come up to the case before us, the question depends singly upon what judgment can be given in this action: there is no doubt but defendants might have been charged as assignees of the term, if no other judgment can be given but only against defendants as executors, then this will be a good plea; Justice *Dennison* cited *Allen* 42. and said he had seen the roll in the case in *Salk.* 316. *Uterius concilium.*

Thrale versus Vaughan. B. R.

DEBT upon bond, oyer of the condition was, that if defendant should indemnify plaintiff for what beer and ale he should deliver to one *Stokes*, then the bond to be void; plea, that the plaintiff delivered no beer to *Stokes* after the making the writing obligatory; replication, that he did deliver beer to the said *Stokes* to such a sum; general demurrer and joinder. Pleading.

Mr. *Ford* objected to the replication, that it did not appear thereby that the beer was delivered before the filing the bill. *Lut.* 407.

Mr. *Poole* in support of the replication said that it tendered a good issue, and if defendant had taken issue, the merits might have been tried.

C. J. Lee: It would have been better to have said, "before filing of the bill;" but as this is upon a general demurrer, and is only matter of form, Judgment for the plaintiff.

Brown versus Seymour. B. R.

ACTION of trespass, assault and mayhem, plea, son assault demi-mesne tried before Justice *Burnett* last Lent assizes; the jury found a verdict for the plaintiff and damages 150*l.* and now it was moved to increase the damages. Mr. Justice *Dennison* certified to the court from his brother *Burnett* that the evidence at the trial was, "that plaintiff was entertained by defendant at his house in June 1741. and had been so for three years before that time, that plaintiff and defendant being drunk together had a great many words, plaintiff struck defendant and used him very ill, upon which defendant turned plaintiff out of his house, plaintiff coming back again for his great coat, defendant took a gun and shot at plaintiff and wounded him, so that he lost three fingers of his left hand: PART I. C the

Mathem.
Court has a discretionary power to increase the damages in this action.

“ the jury considered the provocation and gave only 150*l.* damages, “ and J. *Burnett* said he was satisfied with the verdict.” Mr. *Lloyd* shewed cause why the damages ought not to be increased, and objected that damages could not be increased upon the declaration in this case, which is only general for an *assault*, *battery* and *maibem*, without any particular description of the *maibem*; and cited *Dyer* 105. and said it should have been laid for maiheming his left hand, whereby he lost three fingers. *Stiles* 345. 1 *Sid.* 108.

Gundry for plaintiff: It is laid in the declaration that defendant did assault and maihem him in the left hand, and that is particular enough. 1 *Leo.* 135. *Lit. Rep.* 150. *Latch.* 223. *Hooper* and *Pope*, *Hard.* 403.

C. J. *Lee*: There is no doubt but the court can increase the damages in this case even upon view of the party maimed; as to the cases cited they can be of no use to direct the court, because every case of this kind depends upon its own circumstances. 1 *Sid.* 109. though it does appear that plaintiff has received great damage, yet to determine this case the court must take into consideration the whole circumstances of it; it appeared at the trial there was great provocation given by the plaintiff, and the behaviour of the plaintiff is material to be considered; I think the same as the jury and the judge who tried the cause have done, and that 150*l.* is a great sum, and enough in this case, as it now appears to us, 1 *Rol.* 572. 14 *Jac.* *Baynes* and *Haddock*, for mayheming and knocking out an eye, this court only increased the damages from 11*l.* to 50*l.*

So the rule was discharged.

Tomlin *versus* Burlace. B. R.

For plaintiff
in error.
Rast. Ent.
250.
Yelv. 112.
2 *Cro.* 202.
2 *Salk.* 520.
6 *Rep.* 24. b.
Mod. 551.
S. C.

IN error from the court of *Rochester*; debt upon an obligation; plea *per duritiam*; replication that defendant was at liberty, and made the bond of his own free will; and that he made it not for fear of imprisonment, and concludes to the country; verdict for the plaintiff; and now upon the common errors assigned it was insisted for plaintiff in error *per* Mr. *Lawson*, that the replication was bad, because it was rather a replication to *per minas* than *per dures*; and he cited the cases in the margin; *Gundry* for defendant in error said, the old way of pleading was, that every issue must consist of an affirmative and a negative, but that is now got over. 1 *Inst.* 126. and an issue now, may be of an affirmative upon an affirmative; as if defendant pleads he was born in *France*, and plaintiff replies he was born in *England*, this is a good issue; if the lord avows for rent-service, and the plea in bar be, that the distress was made out

out of the avowant's fee, and the replication that it was within; Bro. issue is a good issue. *Rastall* 555. b. the issue upon *plene administravit* consists of two affirmatives, so the issue in a writ of right. But supposing this replication is informal, yet it is good after a verdict, and helped by the *stat. 4 & 5 Ann.* and so it was adjudged *per totam curiam*, and the judgment affirmed.

Bro. tit. Issue p. 6. Sir T. Jones fo. 6. ——— v. Tomlinson. 1 Show. 250 cited per J. Dennison.

Rex versus Norman. B. R.

NEWMAN an attorney, who was a commissioner to take affidavits in B. R. upon an arbitration to end some matters in difference between two persons upon an indictment in this court examined several persons *ore tenus* upon oath, without putting the matter into writing. *Per tot' cur'*, This is such an offence for which an information must go. *Lacy pro qu. Gundry pro def.*

Rex versus Jones, Esq; B. R.

RULE to shew cause why an information should not go against defendant a justice of peace *pro com' Midd'*, for demanding one shilling of *J. S.* who was brought before him, which defendant insisted upon as his due, for what he called discharging his warrant; and upon refusal to pay it, he sent *J. S.* to the new prison; upon shewing cause this matter was denied, and so the rule discharged, otherwise the court would have granted the information.

Havers versus Bannister. B. R.

POOLE moved to strike out of the declaration eight hundred pounds, and to insert the words eight thousand pounds in case upon *assumpsit*; after plea pleaded, every thing being in paper, the court granted the motion.

Easter

Easter Term.

16 Geo. 2. 1743.

Sir Henry Hartop *versus* Hoare & al'. B. R.

6 M. & S. 14
Bailment.
A market
overt cannot
be for pawn-
ing, and the
court cannot
take notice of
the custom of
London un-
less it be
found.

2 Stra. 1187.
S. C.

TROVER for certain jewels; upon Not guilty a special verdict was found, *viz.* That plaintiff being owner of the goods in the declaration, 12th *January* 1729, inclosed them in a paper sealed up, and also sealed them up in a bag with his own seal, and in that manner, sealed up, lodged them with one *Seymour* a jeweller and banker in *Fleet-street*, for safe custody only, from whose servant the plaintiff took a receipt acknowledging the receipt of the said jewels for the use of his master *Seymour*, to keep them for the plaintiff, and to redeliver them to him on demand, so sealed up as aforesaid; that *Seymour*, without the knowledge, privity or consent of the plaintiff broke the seal, and carried the jewels to defendant's shop, who are also jewellers and bankers in *Fleet-street* in the city of *London*, and traded in jewels, and in the open shop pledged them as his own property for 300*l.* and also gave a note of his hand for the money without any authority from the plaintiff to sell or dispose of them; that the defendants have converted them to their own use; that *Seymour* continued in possession of the said jewels till the time he pledged them; that *Seymour* afterwards became a bankrupt, and plaintiff brought this action for the jewels in the Common Pleas, and upon this special verdict judgment was there given for the defendants; but now upon error brought the Ch. Justice gave judgment, after several solemn arguments at the bar and the bench, as follows:

The general question upon this verdict as found, is, whether the plaintiff is barred from having the jewels re-delivered, or from having satisfaction in damages.

4 Rep. 83.
Moor 248.
Salk. 655.

The plaintiff's delivery was a naked bailment to his own use, and there was no authority given afterwards to dispose of them, so that *Seymour's* breaking the seal made him a trespasser to *Hartop*.

2d Q. How far plaintiff is affected by what has been done by *Seymour*, and whether plaintiff's property be divested by this act? and we are of opinion that *Seymour* had no property general or special; it is true they originally came by right to him, but when he broke the seal he became a possessor *malâ fide*; it was urged at the bar that it was more reasonable that the plaintiff who trusted *Seymour* should suffer, than the defendants, who put no confidence in him; like the case of *Hern v. Nichols*, in *Salk.* 289. but that case is not like this, here the plaintiff used his utmost prudence by sealing the bag, and his particular caution in taking a receipt, and gave no power to *Seymour* to do any thing that might occasion this deceit. 1 Inst. 89

As there seems to be no fault on either side, either in respect to the plaintiff or defendant, it will be necessary for us to see how this case stands at the common law exclusive of the custom of *London* as to a market overt; and this disposition of the jewels in a banker's shop is by no means a divesting the plaintiff's property. *Moor* 624. *Cro. Jac.* 49. 35 *H. 6.* 29. *Bacon's use of the law*, fol. edit. 80. 5 *H. 7.* 15. by the state of these cases it was never apprehended that the true owner lost his property in the goods by a possession, unless they were disposed of in a market overt, and no regard was had to the vendee's coming in as a purchaser without notice, *Vide* 2 *Inst.* 713. 718. the cases cited for the defendants to impugn this rule are *Carth.* 357. *Salk.* 344. 126, 125. but surely property does not always follow the possession, unless the thing lost has no mark by which the owner may know it, as in the case of money, *Cro. Eliz.* 746. *Salk.* 283. *Bank of England* and *Newman*, a bank note payable to A. or bearer, payment to one who finds a bank note is so far good that it discharges the bank.

3d Q. Whether the place where these jewels were pawned will intitle the defendants to keep them till they are re-paid their money? It is found that the defendants often lent money upon jewels in this publick open shop; and it is argued that by the custom of *London*, every open shop in the city is a market overt in respect to those sorts of goods they trade in; and this has been much insisted on for the defendants, and that pawning is within that custom; but we cannot take judicial notice of such a custom on this verdict which has not found it. *Carth.* 75. *Salk.* 125. *Trin.* 5 *Geo.* 1. *Argyle* and 1 *Suz.* 1187. *Hunt*, on a prohibition it was determined the court could not take notice of the custom of *London*, this was for words. But taking it that the custom of *London* would extend to sales, then a question will arise whether a sale and a pawn are the same, for unless they are, the custom would not have availed the defendants in this case if it had been found, *Perk.* 435. 1 *Sid.* 135. *Noy's Max.* 28. *Lamb. Customs of Kent* 619. 2 *Sid.* 139. *Jenk.* 83. 35 *H. 6.* 25. *Jenkins* was a learned Judge, and there is no instance wherever this

PART I.

D

custom

custom has been allowed as to pledges; it is objected that this finding is by a jury who cannot try it but by the mouth of the Recorder; this is contrary to *Cro. Car.* 517. *Cro. Jac.* 69. *Hob.* 86. *Jones* 412. this custom is unreasonable, (to shew which he cited) *Jenk.* 83. *stat.* 1. *Jac.* 1. c. 1. is very material, but we are all of opinion that the plaintiff has a good right to recover without the aid of that statute; accordingly the court gave judgment for the plaintiff *Hartop*.

Sadlers Company and Badcock Trustee of the Hand-and-Hand Fire-office. In Chancery.

Insurance.
The party insured ought to have a property in the thing insured at the time of the insurance made, and at the time of the loss, or he cannot be relieved.

MRS. *Strode*, lessee of a house, insured the same for seven years from fire, to the value of 400*l.* her term therein expired (before the policy), viz. at *Midsummer* 1740, on the 6th of *January* following the house was burnt down; on the 23d of *February* following Mrs. *Strode* assigned the policy to the plaintiffs, who are the ground landlords, and now a bill is brought against the insurance-office for the 400*l.*

Lord Chancellor: The question is, whether by the assignment the plaintiffs are intitled to recover the 400*l.* And I am of opinion that the party insured ought to have a property in the thing insured at the time of the insurance made, and at the time of the loss by fire, or he cannot be relieved. Mrs. *Strode* had no property at the time of the fire; consequently no loss to her; and if she had no interest, nothing could pass to the plaintiffs by the assignment.

Interest or no interest must be inserted in policies of insurance of ships, or the insured must prove he had interest on board.

If the insured was not to have a property at the time of the insurance or loss, any one might insure upon another's house, which might have a bad tendency to burning houses. Insuring the thing from damage is not the meaning of the policy, it must mean insuring Mrs. *Strode* from damage, and she has suffered none.

See Cases in Parliament, where a fire happened in 1721.

Bill dismissed without costs.

The

The King *versus* The Bishop of London. B. R.

THIS was a motion for a *mandamus* to the Bishop of London to grant a licence to the Reverend Mr. *Dawney* to preach as lecturer of the parish of St. Ann Westminster, for that by the statute of uniformity of Car. 2. no one can preach as lecturer of any parish without a licence from the Bishop.

2 Stra. 1192.
S. C.
13 & 14 Car.

*See Mr. Fords
Note of this case
13 East. 420*

The principal facts that appeared upon the affidavits on both sides were these; that in November last Dr. Thomas the late lecturer resigned the lectureship, which being so vacant the select vestry, consisting of a few persons, chose one Mr. Church lecturer, who was admitted by the rector Dr. Pelling, to preach as such, and received by the parish; afterwards some of the parishioners being dissatisfied with the election of Mr. Church, proposed to put in one Mr. Dawney, and a roll or paper was carried about the parish, from house to house, which was signed by 520 parishioners, who approved of, and thereby elected Mr. Dawney lecturer, and as the lecturer is supported merely by the voluntary contributions of the inhabitants, and as no temporal benefit or certain stipend was settled on such lecturer, several of the principal persons who signed the said paper, waited upon the Bishop, desiring he would licence Mr. Dawney, which was refused by the Bishop, Mr. Church having before been chosen by the select vestry, consisting of a few persons, and admitted and received by the Rector Dr. Pelling and the parishioners. And now cause was shewn why a *mandamus* should not go to the Bishop to grant the licence as aforesaid.

Mr. Gundry of counsel with defendant: Supposing Mr. Dawney to be duly elected, which I do not admit, yet I apprehend the Bishop is the proper judge whether he shall be licensed as a fit person to preach; what is a *mandamus*? it is a writ to admit one into an office to which he has a right, or to restore him to one, from which he has been wrongfully displaced; there is no such office as a lecturer known in the law, there is no other incumbent except *vicar* or *rector*; the *rector* may hire a lecturer if he pleases, and he may preach, for the freehold of the church is in the *rector*, and by the constitution of the church the *rector* is not obliged to preach, only to read a homily; in this case there is no temporal profit arising to the *lecturer* in certain, only a voluntary contribution of the parishioners, and therefore it is no office.

What a *mandamus* is.

But supposing it could be called an office, yet as preaching is merely spiritual, the Bishop is the proper judge whether the person chosen be a fit person to preach; in an institution to a benefice the

Bishop

Bishop acts as a judge, and so it was determined in parliament cases between the Bishop of *Exeter* and *Beal*; it cannot be tried by a jury whether Mr. *Dawney* be a fit and proper person to preach. ^{2 Inst. 631, 2.} 5 *Rep. Specott's case*. I do not know that there ever was a *mandamus* to the Bishop to institute to a church; and I question whether the rector might not bring an action against any person the Bishop shall license to preach as lecturer, if such person should go into the pulpit and preach without the leave of the rector, in whom the freehold is.

By the canons no person can preach unless admitted by the Bishop, and the canons bind the clergy in spiritual matters, and the statute of uniformity is only a confirmation of the canons in this matter. There is a *caveat* entred against Mr. *Dawney* in the Spiritual Court, and where a matter is in controversy in the proper court, this court will not interpose; as in the case of 5 *Mod.* 374, 375. and in *Trin.* 2 G. 2. where a *mandamus* was moved for, to license one *Wallis* to teach school at *Hackney*, it was refused, because a *caveat* was depending. A *mandamus* to swear a deputy register of the consistory court of *York* was refused because there was a matter in the case in controversy in *Canc.*

In the case of *The King* and *Rhodes*, indictment for forgery, at *Nisi prius*, the trial was put off, because the validity of the will was depending in the court of delegates.

In the case of *Con. Phillips* in a motion for an attachment, the court would not interpose, because the validity of her marriage was pending in the Spiritual Court, as touching some matter about the contempt.

And in *Pas.* 13 Geo. 1. Mr. *Vincent* was chosen lecturer of *St. Dunstan's* parish, where there had been a lectureship time out of mind, and land given to trustees to be applied to the lectureship; a licence was applied for, but refused by the Bishop, and upon application for a *mandamus* this court would not grant one, because, some matter relating to this lectureship was then under litigation in the court of Exchequer; in this case, though there was land belonging to the lectureship, yet the court said the Bishop had the discretion to grant a licence or not.

^{Elections how to be.} Serjeant *Wynne* on the same side; Mr. *Dawney* cannot be said to have a majority of the persons paying to church and poor on his side, there being in this parish the number of 1130 of such persons; besides, his election in the nature and manner of it is void, for it is laid down that in elections, the consent of the electors must be given at one and the same time, *simul & semel*, *Davis's Rep.* 48.

Sir *John Strange* insisted on the behalf of Mr. *Dawney*, that a *mandamus* ought to go to the Bishop; that in the parishes of *St. Clements*, *Covent Garden*, and *St. Giles's*, the select vestry do not choose the lecturer, although the select vestry does in the parishes of *St. James*, *St. George Hanover Square*, and *St. Martins* in the fields; but they derive that power under the express words of an act of parliament.

It is objected that Mr. *Dawney* was not duly elected, because no notice of such election was given in the church; our affidavits answer, that the churchwardens would not let notice be given; it is also objected that our affidavit does not say that 520 are a majority, and that a lecturer is no officer, and that the law knows no such office, but the act of uniformity mentions such an office, also the 1 *Codex*, fol. 65.

When an act of parliament gives power to a particular person, to do some particular thing, as in the case of a justice of peace, this court will grant a *mandamus* to a justice to execute an authority given him by a statute commanding him to determine such or such a complaint which has been laid before him.

A *mandamus* lies to the ordinary to grant administration, 1 *Sid.* 281. 2 *Sid.* 214. this court obliges him to execute the authority given him; not how he shall execute it.

In the case of *The King* and *The Mayor of Canterbury*, the mayor had authority in him to grant a certificate, and a *mandamus* was granted to oblige him to grant a certificate to one who was intitled to it. *Mich.* 1 *G.* 1.

In the case of a school-master *The King v. The Bailiffs of Morpeth*, *mandamus* to the bailiffs to license a school-master, *Trinity* 3 *Geo.* 1.

The King and Dean and Chapter of Dublin, *Hil.* 7 *Geo.* 1. *mandamus* to admit Mr. *Dowgate* to a stall in the cathedral of *Dublin*.

The King and Dean and Chapter of Norwich, *mandamus* to admit Dr. *Sherlock*, Master of *Catherine Hall*, a prebend of *Norwich*, *Trin.* 4 *Geo.* 1. *The King v. Bishop of Salisbury*, the like to admit Mr. *Clarke*.

In *Trin.* 9 *Geo.* 1. Dr. *Bentley's* case, a *mandamus* was granted to admit Dr. *Bentley* to his academical degrees.

And if the rector can refuse the pulpit to whom he pleases, he may object to whomsoever the parishioners may choose; there are various facts objected which the court now has no occasion to determine, but when the *mandamus* is returned, the court will then see what they put it upon.

Mr. *Floyd* on the same side for Mr. *Dawney*: The select vestry have refused to let notice be given in the church of the election, and now they come and object to our manner of election; why does any one present to a living? The reason is, because the law supposes every one who has the presentation is the founder; we are the persons who are to pay Mr. *Dawney*, therefore the reason is strong that we ought to have the right of choosing him.

A *mandamus* will lie to a court leet to do a particular act.

When rectors
and vicars
were first in-
stituted.

There never was a *rector* before the council of *Lateran*, nor a *vicar* till the time of King *John*, and a *lecturer* may be more ancient than either of them for ought I know; however, they are taken notice of in the *stat. Car. 2.* as to these licences.

Right of bi-
shops to grant
licences to
marry.

A *mandamus* was granted to admit Dr. *Bland* provost of *Eaton*.
1st of December 1735. in Chancery, a question arose before my Lord *Talbot*, as to the right of bishops to grant licences to marry; Lord *Talbot* said as they were taken notice of in the stamp-act as to this right, it would be too much for him, not to take notice of such a right, when the same was taken notice of by the legislature.

In *Hil. 3 Geo. 2. The King v. Ward.* Motion for a *mandamus* to the Archbishop of *York* to admit one———deputy register, (I think), Dr. *Sharp* had appointed one *Shaw*, his deputy, *Shaw* applied to the delegates; then a question was, whether a *mandamus* would lie for a spiritual officer, and a deputy only, and a *mandamus* was granted.

Mr. *Jones* on the same side cited 1 *Vent.* 187. 1 *Palmer* 31. 5 *Mod.* 374. (not applicable to this case), and said that this question depended upon the act of uniformity, no action will lie against the Bishop for refusing this licence, and if it would lie, it would only be for damages; Mr. *Dawney* could not thereby recover the lectureship.

Mr. *Gundry*'s reply to some of the cases cited; he said that the case of a register to the Bishop's court was a temporal benefit, and that an ejectment would lie for a prebend's stall, or an assize will lie; after he is admitted ejectment lies, it is a freehold; as to the case

case of a school-master every man by the common law has a right to follow the business he is brought up to; as to the case of Dr. Bland the question there was, whether the Dr. had a negative voice; the *mandamus* was for him to put the seal to a presentation, and that question was merely triable in the temporal courts. }

Lee Chief Justice, after taking time to consider of this case, delivered the opinion of the court.

It appears by the affidavits on both sides of this motion, that 23 persons of this parish met at a vestry at *St. Ann's Church*, and chose Mr. Church lecturer, and that he has been received as such, both by Dr. Pelling the rector, and great part of the parish.

It also appears that after this, a paper was carried about the parish, and signed by 520 persons who have named and approved of Mr. Dawney for their lecturer, and that he has not been received by the rector or minister of the parish, and the Bishop of London has refused to give him a licence to preach;

It appears that this parish has no fixed stipend for a lecturer, but merely depends upon the voluntary contributions of the inhabitants; nor does it appear that there is any certain custom as to electing a lecturer. Therefore as there is no certain custom, nor does it appear that either of these persons Mr. Church or Mr. Dawney have a demand of one penny from any parishioner or any body whomsoever, but that the contribution to a lecturer is merely voluntary, the question is, whether this court will at all interpose in this matter, and we are of opinion there is no foundation at all in this case to ground any right upon. }

The ground whereupon application is made to this court is upon the statute of uniformity, whereby all persons are forbidden to preach as lecturers, without a licence.

It is true, that it is not in the Bishop's power to withhold his licence whenever he pleases, but if he should grant it in this case to Mr. Dawney, and Dr. Pelling the rector should refuse him the pulpit, such licence would be of no effect, and it is plain the fee of the church is in the rector (*Watson's Comp. Incumbent* 709. 2 *Gro.* 366. *Noy* 104.) and he may admit what lecturer he pleases, and has already admitted Mr. Church, who is now in possession; here is no temporal right in question, and the parishioners have no right to make such election, as to oblige the rector to admit Mr. Dawney lecturer into the pulpit. *Mich.* 12 *W.* 3. in *Holt's Reports* (a book of no authority) cited as a case in point, whereof my Lord Chief Justice said he had seen a more accurate report. The rule to shew cause why a *mandamus* should not issue discharged.

Thoresby

2. 2^d A. 1205

1. T. R. 431

4 T. R. 125

2 East 462.

12. Mod. 433.

3 Sack 87

Thoresby *versus* Sparrow. B. R.

Oyer not to
be dispensed
with though
shewn to be
lost.

1 Saund. 8.

Salk. 498.

2 Lutw. Sym-
son and Gar-
fay.

2 Stra. 1186.

S. C.

5 Rep. Wy-
marsh's case.

Lyfford's case.

6 Mod. 154.

Foxon and
Moseley.

1 Mod. 266.

IN an action of covenant upon a lease, defendant prayed *oyer*; plaintiff made affidavit that he had searched for the lease and could no where find it; and now it was moved thereupon that the court would dispense with the *oyer*, that the plaintiff had not the original lease but only a copy, and was willing to give defendant a copy thereof; but *per curiam*, this business of *oyer* does not depend upon the rules of the court, but the defendant has a right to it by law, and it would be error if the court should deny defendant *oyer*, as the plaintiff has declared upon the deed, and made a *profert* thereof; for now it is supposed to be actually in court, how then can we deny it; if any thing can be done for plaintiff in this case, it must be by helping plaintiff in declaring, and there, upon proof that the original lease is lost, a copy may be given in evidence, and plaintiff might have declared in debt without setting forth this deed; but wherever an action is brought on a deed, charging defendant with the execution of it, the plaintiff must there bring the deed into court; the reason is, that the court may see whether it be executed according to law; and we had better suffer a private mischief than a public inconvenience; the rule to shew cause why *oyer* should not be dispensed with, was discharged, *per C. J. Lee. Wright and Denison, absente Chapple.*

Smith *versus* Nicholson. B. R.

Practice.

6 Mod. 130.

2 R. A. 490.

Salk. 321.

Plaintiff can-

not call for a

return of a ca.

fa. pending

error.

2 Stra. 1186.

S. C.

See 2 Stra.

867.

A *Ca. fa.* was taken out the 3d day of *December* and left in the sheriff's office, the same day in order to have *non est invent'* returned thereon, to ground proceedings against the bail, which was afterwards done; a writ of error was allowed the 4th of *December*, and notice thereof given, notwithstanding which, proceedings were had against the bail; and now upon Sir *John Strange's* motion to set aside the proceedings on the *sci. fa.* against the bail, the question was, whether this writ of error was a *superfedeas* to the *ca. fa.* on the 4th of *December*, the sheriff not having then executed it; and *per cur'* it is a *superfedeas*; but if the execution had been executed before the allowance of the writ of error, the sheriff might return it afterwards, so the proceedings on the *sci. fa.* against the bail were set aside. *N. Pas. 9 Geo. 1. Oldridge and Stroude*; 2d *sci. fa.* returnable 13th of *May*, same day error brought, and the *sci. fa.* returned and held right.

Witcher *versus* Chessam. B. R.

WITCHER was sued in the spiritual court for disturbing a person in his seat in the church, and now suggested for a prohibition that he purchased an ancient house with this seat belonging to it, to him and his heirs, which was pleaded below. *Per cur'*, This is enough to shew the temporal right is in question; and a prohibition was awarded.

Prohibition.
Poph. 140.
2 Roll. Ab.
188.

Jervois qui tam *versus* Hall. B. R.

QUI tam upon the game act for killing a hare, verdict for defendant; motion for a new trial, because the Judge who tried the cause refused to admit a person to be a witness, who was a parishioner of the same parish where the hare was killed; but C. J. Lee said, he did not remember that ever a new trial had been granted in the case of a penal action; and so *per cur'*, the motion was refused.

No new trial
in a penal ac-
tion.

Not law
Mulson v Rastall
Tenn. 32. Geo. 3

Middleton *versus* Price & al'. B. R.

ACTION of imprisonment; the defendants jointly justify under process *ore tenus*, issuing out of an inferior court, according to the custom thereof; demurrer and joinder; and it was objected by Draper serjeant for the plaintiff, that this is said to be a court of record, and the process is said to be by word of mouth, how therefore can it be tried? it is not said that any summons was awarded by the court, it is not said that it issued out of the court, it does not say that it was commanded by the court, nor is it said to be executed at the request of the plaintiff therein; it does not alledge that the officer returned the process; plaintiffs in inferior courts are obliged to do their duty; the *stat. 12 Geo. 1. c. 29.* requires an affidavit of a debt of 40s. or upwards to be made; here was none, and though this custom of *ore tenus* process might be good, yet this statute is a repeal of it. Serjeant Wynne *e contra*, I admit, if the plea is bad as to one, it is bad as to both defendants, because they have both joined in the same justification; the strongest objection seems to be, that the officer does not, by the plea, shew, the return of the process, and that wherever officers justify under process, they must shew that the process was returned. 9 Co. 67. 1 Roll. 557. p. 4. (but *nota*, I did not hear serjeant W. give an answer to this objection). Lee Ch. Justice: This appears to be an arrest upon *mesne* process; a plaint was levied, then a summons issued, then a *capias ore tenus*, and to that there is no return at all;

1 Salk. 409.
2 Roll. Ab.
563. f. 18,
8, 9, 10.
Justification
under process
must shew it
was returned.
2 Stra. 1184.
S. C.

Sir T. Jones
23, 53.
Thomson's
Entr. 343.
Cro. Car. 259.
2 Roll. 672c
1 Brownl 204.
9 Rep. 63.
Lutw. Pool
and Wynn.
Hob. 63.

PART I.

F

when

when an officer justifies under process that is returnable, he must shew that he has done all that was his duty to do; this being *ore tenus*, can make no difference; and indeed, as brother *Draper* says, I do not see how this can be tried; there is some weight in the other objection, what time the summons was given to the officer does not appear, but these are sufficient reasons for the court to give judgment for plaintiff, and he had judgment accordingly.

Trinity Term

16 & 17 Geo. 2. 1743.

Rex *versus* Grosvenor. B. R.

Rex v. Shal-
leton of city
of York, Hil.
8 Geo. 2.
2 Vent. 243.
Rex v. Lar-
wood, 4 Mod.
Comb.
2 Ld. Ray.
1354.
2 Mod. 299.
Stat. 1 W. &
M. c.
Rex v. Pitt,
Trin. 5 Geo. 1.
Act of tolera-
tion.
Act of corpo-
rations 13.
Car. 2. ft. 2.
cap. 1. sec. 12
Carth. 14, 15.
Saund. Green
and Cole.

N. It might
be tried in an
action.
2 Stra. 1193.
S. C.

UPON a motion for an information against *Grosvenor* for refusing to serve the office of one of the sheriffs of *London*, it appeared by affidavits that he had been duly elected thereto, and that he refused to give a bond to serve and enter upon the said office; on the other side it appeared that the defendant is a protestant dissenter, that he has qualified himself in all things according to the act of toleration, but in his affidavit he has said that it is against his conscience to take the sacrament according to the rites of the church of *England*; it also appeared that there is a by-law whereby large sums of money have been taken of several persons by way of fine for refusing to serve the said office, amounting to 35,000*l.* in a little time; *per cur'*, this is a doubtful question, and a matter of very great consequence, and we will not interpose to have this matter tried in a criminal way, when it appears that the city have another, and *that* a civil way of obliging persons to serve this office; and this case differs from the case of *Larwood*, for it does not appear that in that case there was any by-law or other way of enforcing the election than by application made to this court, so the rule to shew cause why an information should not go was discharged. *Per Lee, C. J. Wright and Dennison, absente Chapple.* Sir *J. Strange, E. Bootle*, and *Umlin* serjeant and recorder

corder of *London, pro rege*; *Floyd, Hume, Leeds* serjeant, and *Draper* serjeant for defendant.

N. A case cited by *Leeds* serjeant, *Rex v. School, Mich. 2 Geo. 2.* Upon a motion for an information for a misdemeanor, the affidavits charged that defendant procured one *Reed* to burn some writings of an estate of great value, and that defendant forged another writing of the same estate; but this, though so great a crime, appearing to have been done three years before, the court refused the information.

N. A case cited by *Draper* serjeant, *Rex v. Fish, Trin. 5 G. 1.* Motion for information against three or four persons, suitors of a county court for disturbing the court in choosing a verderor, the question was, whether the suitors or the sheriff had authority to adjourn the court; this court determined that the sheriff had the legal authority, yet because there was no breach of the peace, and it arose from a mistake in judgment; this court refused to grant the motion, though they were against the defendants as to adjourning the county court.

Thrale versus Vaughan. B. R.

DEBT upon bond, with condition that if defendant should indemnify plaintiff for what beer he should deliver to one *Stokes* then the obligation to be void, and judgment for plaintiff after demurrer; upon a motion to set aside *fi. fa.* a writ of error being brought, but no bail to the writ put in, it was objected for plaintiff that this bond was within the *stat. Jac. 1. c. 8.* and that bail should have been put in before execution could be staid. But *per cur'* this is not a bond for payment of a certain sum of money, and this statute ought to be construed strictly, and the *fi. fa.* was set aside.

Ante. 5.
Yelv. 227.
1 Lev. 117.
Spinks and
Bird, Barnes's
Notes 66.
2 Bull. 54.
1 Keb. 613.
Carth. 28, 9.
Comyns 321.
On what
bonds there
shall be bail
in error.
2 Stra. 1190.
S. C.

Pitts versus Carpenter. B. R.

ACTION upon the case; defendant pleaded a set-off, and upon the trial the plaintiff proved there was due to him from the defendant 4*l.* 15*s.* 3*d.* and the defendant proved the plaintiff owed him 3*l.* 2*s.* so that the balance due to the plaintiff was only 1*l.* 13*s.* 3*d.* for which he had a verdict.

A set-off reducing the plaintiff's demand under 40*s.* doth not affect the jurisdiction of this court.
2 Stra. 1191.
S. C.

And now it was moved by Mr. *Moreton ex parte def'*, that he might have leave to enter by way of suggestion on the roll, that plaintiff and defendant were both citizens of *London*, and that the

Bursfield and Soams, Pas. 11 Geo. 1. and in Hickman and Colley, Pas. 12 Geo. 2. where the sum recovered does not exceed 40s. it has been construed to be within the stat. Jac. 1. viz. when it appeared at the trial that the plaintiff had no greater demand than 40s.

the cause of action arose within the city of *London*, and that the verdict being for less than 40s. it is within the jurisdiction of the court of conscience, which was constituted by stat. 3 Jac. 1. cap. 15. But for the plaintiff it was insisted by Mr. *Stracy*, that the plaintiff's cause of action was for 4*l.* 15*s.* 3*d.* and that it was in the defendant's own power and knowledge only what he could prove, or would prove by way of set-off; and if the plaintiff had gone to the court of conscience for this demand, and the defendant had thought fit not to have proved any set-off, it is plain that the court in such case would have had no jurisdiction; and so it was resolved *per cur'*, and that the demand of plaintiff remains as it did before the statute for setting one debt against another; and if the inferior court should have jurisdiction in this case, it would be very inconvenient; for suppose there are mutual demands of 10,000*l.* between merchants, and upon the balance there should happen not to be above 40s. due, that court would have jurisdiction in that case as well as in the present, if we should allow this; so the rule was discharged, and plaintiff had judgment. *Per Lee, Wright and Dennison, absente Chapple.*

Seacomb *versus* Bowlney. B. R.

1742 C 554

A chaplain to an ambassador, if he does no duty in his house, shall not be protected.

DEFENDANT having been arrested by an officer to the sheriff of *Middlesex*, while he was in custody produced a certificate that he was chaplain to Baron *Wafner*, resident to the Queen of *Hungary*, upon which the officer let him go, and the plaintiff having served the sheriff with the common rule to return the writ, it was now moved on behalf of the sheriff to discharge that rule; and upon shewing cause, it was objected by the plaintiff, that though the affidavit swore he was chaplain to the resident, yet it does not say that ever the defendant did duty; and in the case of *Holmes and Gurdon*, Mic. 7 Geo. 2. Defendant insisted on privilege as secretary to the Duke of *Mecklenburgh*, but it not appearing on the affidavits that he did any duty, nor what was the nature of his office, this court held he was not entitled to privilege; the same was determined in the case of *Lockman*, secretary to *Monsieur de Toms*; and *per cur'*, the act of parliament has not given protection to any but domestick servants of Ambassadors, and it has always been part of the inquiry by the court what was the nature of the office of every servant; as to the bailiff he had nothing to do but to see whether the defendant's name was entred in the sheriff's office, for if his name was not there, (as it seems it was not in this case) the officer was in no danger by arresting defendant, for the affidavit on behalf of plaintiff swears, that the officer was told that the defendant was not registred, and notwithstanding the bailiff thought fit to discharge him, the sheriff shall return the writ. *Per Lee, Wright and Dennison, absente Chapple.*

Pulling *versus* Reddy & è contra. In Chancery.

IF a legacy be given to *A. B.* upon this condition that she marry with the consent of a third person, and there be no devise over in case she marry without such consent, this is only to be considered *in terrorem*; but if there be a devise over, then it shall go to whom it is so devised over; this rule is taken from the civil law, as this court has a concurrent jurisdiction as to legacies; but if a portion be to arise out of land where there is no devise over, then it shall go to the heir, and the spiritual court has no jurisdiction as to lands; there may be more doubt where money is given to be laid out in lands. *Per Lord Canc. Hardwicke.*

Devise in terrorem.
Cann v. Cann.
coram Lord
Macclesfield.

Lade *versus* Lade. In Chancery.

L AID down *per* *Ld. Hardwicke* as a certain known rule, that where a man purchases lands in the name of another, it is a resulting trust.

Resulting
trust, what
it is.

Yaw *versus* Leman. B. R.

T HE defendant, who was landlord to plaintiff, covenanted in the lease to pay the land-tax and save the plaintiff harmless; the premises were taxed at the rate of 150*l.* *per ann.* but the defendant only had the rent of 120*l.* *per ann.* and an action being brought on this covenant, it was moved that upon paying land-tax at the rate of 120*l.* *per ann.* all proceedings might stay, which on hearing counsel on both sides was resolved *per cur'*, although the plaintiff was really taxed at 150*l.*

Landlord who
covenants to
pay land-tax
shall only pay
according to
the rent here-
ceives, and
not according
to the rent
the premises
are taxed at.

1743.635

Hyde

see

3. vol. T. R.

377.

Rex *versus* Richardson & Lacy. B. R.

T HE court granted a *mandamus* to two justices to proceed and give judgment in a certain complaint depending before them on the *stat.* 11 Geo. 2. for the relief of landlords, upon the return of the *mandamus* the justices said therein that they had heard and determined the complaint that was before them, and that returned was allowed.

Mandamus to
justices to de-
termine a
complaint be-
fore them,
they return it
is determined,
which was
allowed.

Rex *versus* Waite. B. R.

Information
for a libel.

AN information was granted for these words in a letter to the mayor of *Richmond*; viz. "I am sure you will not be persuaded from doing justice, by any little arts of your town-clerk, whose consummate malice and wickedness against me and my family will make him do any thing, be it ever so vile.

Rex *versus* Vaughan. B. R.

An Attorney
fined 500*l.*
and imprison-
ed for taking
200*l.* of one
charged with
forgery to let
him out of the
custody of a
tipstaff.

MORGAN, an attorney of *Clifford's Inn* was outlawed for felony in forging a note, and being so outlawed, the prosecutor hearing he was in *London*, applied to *Vaughan* an attorney to get *Morgan* taken up with a Judge's warrant, which was done; and having got *Morgan* in his custody (along with the Judge's tipstaff) took 200*l.* of *Morgan* to let him go, for which an information was granted against *Vaughan*, upon which he was tried and found guilty; and now *J. Wright*, (*absente Chapple propter ægritudinem*) pronounced judgment of the court, that this crime was little less than felony, and formerly was punished as such; that *Vaughan* was fined 500*l.* and to suffer six months imprisonment, and till he paid the fine.

Anonymous. B. R.

No new trial
shall be where
there was evi-
dence on both
sides, though
a verdict be
against the
judge's opi-
nion who tried
the cause.

ON a motion for a new trial in an action by the owner of the inheritance for making a dam cross an ancient water course, the judge who tried the cause, certified that six witnesses were examined at the trial on each side; that the jury found for the defendant, which was against his opinion, but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides; so a new trial was refused.

Willis *versus* Lewis. B. R.

No occasion
for notice to
appear upon
process served
where the
debt is above
10*l.*

IN an action of debt upon bond for 100*l.* defendant was served with a copy of the process according to the *stat. 12 Geo. 1.* and it was resolved *per cur'*, that there was no occasion to put the notice to appear at the bottom of the process according to the *stat. Geo. 2.* this being above 10*l.*

Olivant

Olivant *versus* Berino. B. R.

IN trover for some pictures, it was moved that plaintiff should be obliged to take the pictures and costs, upon an affidavit that they are all the goods that the defendant has of the plaintiffs, and that not denied; but *per cur'*, this action is for damages, and you cannot oblige the plaintiff to accept the thing itself.

2 Salk. 597.
Bowen v.
Wright, Hil.
9 Geo. 1.
Q. Freeman
and Black-
burn.

N. In *Buxton and Gabell*, Trin. 9 Geo. 1. Trover for a ring; and *Paf.* 9 or 10 Geo. 2. in trover for goods, this court refused the like motion.

In trover de-
fendant can-
not bring the
goods and
costs into
court.

Long *versus* Miller. B. R.

DECLARATION was delivered within the term; rule to plead was given the 7th of May, and expired the 11th, and no plea being put in, defendant applying for time, but no order made by the Judge, after the time for pleading was out, and before plaintiff had signed judgment, the defendant pleaded in abatement, and the question now was, whether this plea being after the time for pleading was out and a dilatory, should hinder the plaintiff from signing judgment. And *per cur'*, the plaintiff shall have his judgment, for pleas in abatement must be pleaded in four days, if the declaration be delivered before the last four days in term, if in those last four days, defendant must plead after a special imparlance within the first four days of the next term, and this is the practice of the court; and although fair pleas to the action are received after the rules to plead are out, and before judgment at any time, yet dilatory pleas never are, and no court ever favoured them.

Vide rule of
court made
Trin. 1727.
Styl. Reg.
396.
1 Lil. Prac.
Reg. 2.
Cates in K.
William's
time 524.
Practice as to
pleas in a-
batement.
2 Stra. 1192.
S. C.

N. Hil. 13 Geo. 1. *Heath v. Badon*, cited by *Wright J.* Trespas, defendant pleaded after four days were expired, in abatement, and on motion, *cur'* set aside the plea.

Catlin *versus* Catlin. B. R.

DEFENDANT was arrested and held to special bail in an action of trover, upon an affidavit that the value of the goods converted by defendant amounted to more than 10*l.* and now it was moved to discharge defendant on common bail; but denied *per cur'*, and there is no occasion for a Judge's order.

6 Mod. 14.
cited per
Wright J.
where defen-
dant held to
special bail in
trover.
2 Stra. 1192.
S. C.

N. Trin. 11 & 12 Geo. 2. *Pitts v. Miller* cited as in point.

Walker

Walker *versus* Jackson. In Chancery.

What words
in a will will
discharge the
personal e-
state, and
charge the
real with the
payment of
debts.

Post.

BAWPREE Bell the testator, willed that all his estate in Com' Lincoln' should be sold for payment of his debts and legacies, then devises to *Emmah Marshall* an annuity of 200*l.* per ann. to be raised out of his estate, not otherwise in his will ingaged in com' Norf' to be paid half-yearly; then the will goes on, as a farther mark of his sincere affection, he gives the said *E. M.* several pictures, medals, and other specifick legacies; then he gives to *Margaret Bell* 40*l.* per ann. charged on his estate in *Norfolk*, and makes *E. M.* and *Dorothy Bawpree Bell* co-executors, and executes this his will in 1740. in the presence of three witnesses; afterwards, on the 21st of *August* 1741. he with his own hand interlines in the latter end of the same will these words, (*viz*) *And I will give and devise to them* (meaning his executors) *all my personal estate not herein before devised*, and then re-executed his will in the presence of three witnesses; and the only question in this case was, whether the personal estate should be first applied in case and exoneration of the real estate?

If personal
estate shall be
first applied to
pay debts, &c.
2 Vern. 718.
568.
Eq. Ca. Abr.
271.
Baodiff v.
Lisle, 2 Nov.
1732.
Prec. in Canc.
101. *Banfield*
v. Wyndham.
Caf. in Eq.
C. B. Gilbert's
book 73.
Rep. of Caf.
in Eq. 125.
1 Lev. 203.
Feltham v.
Harlinton's
Executors.

Lord Chancellor *Hardwicke*: The general rule is, that the personal estate should be first charged with payment of debts and legacies, and the testator cannot exempt it from being liable to his debts as against his creditors; but as between heir and executor, he may charge them upon any other fund, that is not primarily liable, and discharge the personal estate: there are several ways, by any of which a man may give his real estate for payment of his debts; as 1st, to trustees; 2^{dly}, by way of charge in equity, which this court will decree to be performed, or he may direct that his real estate may be sold for payment of his debts; but let him do it what way he pleases, none of these ways will make the real estate first chargeable, if there be not in the will, either express words, or a manifest intent to discharge the personal estate, but it shall be first liable. And I am of opinion that in this will, there is a manifest intention to give the personal estate to the executors, as a specifick legacy; the will is, that all my estate in *Lincolnshire* be sold for payment of my debts and legacies, afterwards he gives several specifick legacies to defendant *E. M.* likewise gives some pecuniary legacies, and then makes *E. M.* and *D. B. B.* executors, and executes this his will in 1740. this was only making them executors, and if nothing more had been done, the personal estate would have been first liable; but afterwards in 1741. with his own hand he adds the words above, and re-executes the will: this expressly shews he intended to give these ladies some further benefit, and it is much stronger than if these words had been, at first, part of the will; but if they had been there

at first, I should even then have been of opinion it had been a very strong case. This case was very rightly resembled by Mr. *Clarke*, to the Dutcheſs of *Beaufort's* case; but this is much stronger than any I know, in regard the testator's intention appearing so very plainly by his re-executing his will after the alteration above. (*All the rest and residue of my personal estate*, are the very worst words that can be used in a will to discharge the personal estate, for I have known personal estates made first liable, notwithstanding these words): and so I decree the real estate in *com' Linc'*, or a sufficient part of it, to be sold to pay debts and legacies, &c. *Walker, a bond creditor, v. Jackson* and others, heir and executors of testator, on a rehearing at *Lincoln's-Inn-Hall*, July 22, 1743.

N. Bromball v. Wilbrabam at the *Rolls* 1724 or 1734. cited by Mr. *Noel* in behalf of the heir; the words of the will in that case were, All my personal estate of what nature or kind soever, I give to my sister *A.* and make my sister *A.* executrix, and I give to my two brothers all my real estate chargeable with payment of my debts; there it was determined the personal estate was first to be applied.

N. Stapleton v. Coleville, at the *Rolls*, July 17, 1735. *A.* by will devises lands for life (chargeable with payment of his debts and the annuities given by the will) to his wife, and thereby gave her power and authority by sale or mortgage of such part as she should think proper to raise such sum as should be necessary for the payment of his debts, and gave her all his personal estate, and made her sole executrix, and takes notice in his will that the estate had been for several generations in his family; the Master of the *Rolls* held the personal estate discharged, and decreed *pro def'* (the wife).

On an appeal 10 July 1736. *Ld. Talbot* confirmed the decree, and said, though a personal estate is the natural fund, yet a man may substitute another fund, and the personal estate may be exempted by words that implicitly declare such intention from the whole form and tenor of the will.

Michaelmas Term

17 Geo. 2. 1743.

Everall *versus* Smalley. B. R.

Custom to
bar intails of
copyholds by
recovery or
surrender,
good.
2 Stra. 1197.
S. C.

EJECTMENT, of copyhold lands in *com' Nottingham*. A case was made for the opinion of the court, wherein it was stated, that within the manor of *Collingham* where the land was, there were two customs of barring estates tail, which had been used within the same manor time out of mind; one way was by common recovery, the other by surrender in fee to the purchaser or vendee.

Edward Smalley on the marriage of his son *Robert*, surrendered the premises to his said son *R.* and *Susannah* his wife, and their heirs in general tail; they had issue *Edward Smalley* their son and heir, who after their deaths became tenant in tail, and 27th of *March* 1729. surrendered the premises according to the custom of the manor to *John Mills* and his heirs in fee, who dying, left *Robert Mills* his heir and plaintiff's lessor; the defendant was *Henry Smalley*, son and heir of *Edward Smalley*, who surrendered the premises to *John Mills* as aforesaid in fee.

And whether the defendant *Henry Smalley* the heir in tail was barred by the surrender in fee, where there is also a custom within the same manor of barring by recovery, was the question?

After two arguments by *Caldecott* and *Hern* for the plaintiff, and *Poole* and *Lutford* for the defendant, adjudged *per tot' cur'*, that the heir in tail was barred.

Lee Ch. Justice: It has been said at the bar that a custom in a manor to bar a tail by surrender, ought only to be allowed *ex necessitate, i. e.* when in the same manor there is no usage to bar by a recovery; there is indeed great diversity in the books as to barring

1 Sid. 314.
5 Rep. Al-
dred's case.
1 Salk. 203.
Popham 129.
Co. Lit 59.
2 Vern. 704, 5.
3 Rep. Heydon's case.
3 Lev. 327.
Cro. El. 380, 391, 483, 907.
Mo. 358, 753.
Brownl. 121.
Lit. sec. 74.
4 Rep. 23.
Cro. El. 348, 148.
1 Leo. 174, 95.
Poph. 95.
Cro. Car. 717, 484.
2 Saund. 482.
4 Rep. 23.
3 Rep. 8. b.
1 Rol. Abr. 506.
Cro. El. 372.
Mo. 637.
Rol. Ab. 634.
Prec. in Canc. 429.
Baron Gilbert's book, White and Thornburgh.

copyhold intails, but in none of them can I find any case to warrant this distinction, the later opinion of judges is, that in manor courts where a real action can be brought, a recovery in such court will be a good bar; I own I can see no reason why this custom to bar by surrender should not be good, but it is objected that there is no recovery in value; the same may be objected to barring intailed copyholds by recovery, for recompence in value does not extend to copyholds, the issue in tail of copyholds not being barred in respect of the recovery in value; but to prevent the inconvenience of perpetuities, these two customs may well stand together, and are but two different ways of barring the intail, and I think the surrender the best.

Chapple to the same effect, and the customs must be taken to be both coeval, we cannot say which is prior, they seem equally convenient to prevent perpetuities.

Wright J. It seems to be agreed by the counsel on both sides, that an intail of a copyhold may be barred by a recovery, or by a surrender in fee within a manor where there is no custom for barring by recovery: but it is insisted on one side, these two customs cannot stand together; it has been a controverted question since I attended this bar, whether copyholds could be intailed; it is now at this day said they may, by custom co-operating with the *stat. de donis*: but this is quite new to me. *Stat. de donis* created no new estate. Copyholders are no more than tenants at will, and it is by the will of the lord, and his mere consent only, that they are permitted to limit their copyholds in this or that way, either by surrender, or as the custom happens to be; and surely the lord who of his mere will permits a limitation to *J. S.* and the heirs of his body, may permit *J. S.* to alien the same by surrender; no body ever thought that copyholds were within the *stat. de donis*; barring intails in copyholds have been much talked of, but I think there is no such thing, it is only a way invented and permitted by the lord to get rid of the intail; the true reason of the issue in tail being barred is the recovery over in value, now there can be no such thing in case of a copyhold; I think the surrender is a better way, if the lord permits it, because cheaper. *N. B. Wright* Justice declared that there was no possibility of understanding this matter by the books, and said he had laboured much to understand them, and could not.

Dennison J. Nothing more clear than that tenant in tail of a copyhold may bar his issue by surrender, and where there may be a real action there may be a recovery. *Co. Lit. 60. b.* These are only two different conveyances, and it might as well be said that at common law, where there is a fine that will bar the issue as well as a recovery,

recovery, that therefore one of them must be void ; a surrender, I think, is a more natural way of conveying copyholds than a recovery, and I cannot see any use a recovery is of, but only to create greater expence.

Cayhill *versus* Fitzgerald. B. R.

Vide Comyns
183. Shelf
and Bailly.
Puit.
Judgment of
the court.
Condition of
arbitration-
bond, that if
G. F. shall
perform such
award as shall
be made be-
tween plaintiff
and J. F. and
awarded that
G. F. the de-
fendant should
pay plaintiff
298l. 9s. 9d
and releases.

IN debt upon an arbitration bond, defendant craved *oyer* of the bond and condition, which recites, that whereas there were differences between one *John Fitzgerald* and plaintiff concerning a certain debt due from him to plaintiff upon a bond for 800l. Now the condition, &c. that if the said *George Fitzgerald* (the defendant) for and on the behalf of said *J. F.* should perform such award as arbitrators should make on or before such a day between plaintiff and *J. F.* the bond to be void ; and pleaded that the arbitrators did not make any award ; plaintiff replied, that *Fell* and *Foster* the arbitrators made an award, and set it forth that *Geo. F.* should pay 298l. 9s. 9d. and that plaintiff should receive the same in full of all demands, and that they should execute releases, and assigns breach that defendant did not pay the money ; defendant demurred, and plaintiff joined in demurrer.

Q. Frontin
and Small.
Trin. 12G.1.

Mr. *Clive* for the defendant objected to the award, that it was bad, because not made between the parties to the submission ; for the award is, that *G. F.* the defendant shall pay to *Mic. Cabill*, and it ought to have been between the parties, *viz. Cabill* and *J. F.* between whom the submission was ; if the arbitrators go out of the submission, the award is bad. *Moore* and *Beedle*, cited in 10 *Rep.* 131. *Roll. Abr.* 246. p. 3, 4. 2dly, This award is bad because not mutual between the parties ; for it is a rule in law that an award cannot be on one side only, and there were no differences between plaintiff and *G. F.* In the case of *Nott* and *Long*, *Micb.* 9 *Geo.* 2. B. R. Lord *Hardwicke* laid down, 1. That an award must be certain, and make a final end between the parties ; 2dly, That the arbitrators cannot delegate their authority, but must act in person ; 3dly, That they can in no case enlarge their power ; and *Bacon v.* — *Cartbew* 412. was cited as in point.

Floyd *è contra*, that the award is good, for that *G. F.* did submit ; and the words of the bond are, *G. F.* for and on the part and behalf of *J. F.* and he binds himself, his heirs, executors, &c. for and on his and their part and behalf, therefore it is as well on the part of *G. F.* as of *J. F.* 2dly, The award is mutual, for the money was to be paid by *G. F.* in full of all demands, and that releases should be executed ; and to shew that *G. F.* is liable as well as *J. F.* cited 1 *Roll. Ab.* 244. p. 18. (but *Clive* in his reply said that in that case

case C. submitted) *Yelv.* 137, 147. *Talbot and Godbolt*; and a release to G. F. will discharge J. F. for releases are to be construed *secundum subjectam materiam*.

Lee C. J. There seems to be no difference between this case and that in *Carth.* 412. but as the money was to be taken in full of all demands, the court doubted, at first they seemed to think the award bad; *sed adjournatur*.

Weld Executor of Weld, Esq; *versus* Nedham. B. R.

PLAINTIFF declared in debt upon a bond in the *detinet* only, which was right; defendant pleaded a sham plea that he did not detain the debt, and concluded with an averment; plaintiff demurred, then the defendant struck out the plea and demurrer, and gave the general issue *non est factum*; and now Mr. Morton moved for leave for plaintiff to sign his judgment, the first being a sham plea, and this irregular. Mr. Poole shewed for cause that it was the antient practice of the court, when there was special pleading, that defendant might strike out the same, and give the general issue; and this was also said by Mr. Benton (clerk of the papers) then in court, to be the antient practice; but *per tot' cur'* this is irregular, and the plaintiff shall have his judgment, for the first was a sham plea, and no special pleading; and although defendant may strike out special pleadings and give the general issue, yet that cannot be done without leave.

Practice.
A sham plea not considered as a special plea.
N. Defendant cannot waive general demurrer, but he may a special demurrer.
Mr. Monday's book 10..

Rex *versus* Shuckburgh. B. R.

DEFENDANT being taken up by virtue of a warrant from the secretary of state for publishing *Old England's Tedeum*, a blasphemous libel, was now brought up by *ba. cor.* in order to be bailed, offered bail to enter into the common recognizance for his appearance from time to time to answer such matters as should be objected against him on behalf of the crown. Mr. Attorney General insisted on bail for the defendant's good behaviour also; the Ld. Chief Justice said it had often been taken both ways, and he intended to take the opinion of all the judges; so at present, defendant himself only entred into a recognizance for his appearance, and into a rule to put in bail for his good behaviour, if the judges, or the major part of them, should be of opinion that he ought.

Bail for publishing libel.
N. The King v. Franklin;
a like case in Trin 5 G 2, argued before all the judges as to this matter of bail, but they never gave any opinion.

Tyson *versus* Ironmonger, Esq; B. R.

An attorney's clerk in open court for male practice cannot be examined *ore tenus* upon oath.

STANTON, an attorney's clerk, attending the court in person upon a complaint against him for male practice, having in his affidavit fully answered the matters charged upon him; the plaintiff's counsel thought he had not told the whole truth, and proposed to interrogate him *ore tenus* in court upon oath. But *per curiam*, you cannot examine a person accused, upon oath, but ask him what you please without oath; so Sir *John Strange* examined him without oath, and he exculpated himself.

Sabin *versus* Long. B. R.

TRESPASS against three defendants, two of them pleaded, the other let judgment go by default; the jury on trial of the issue found for plaintiff damages 35*s.* afterwards plaintiff executed a writ of inquiry against the other defendant, and the jury assessed 2*s.* damages, and judgment was entred that plaintiff do recover against two defendants 35*s.* and against the other 2*s.* Now serjeant *Bootle* moved that the 2*s.* damages might be struck out, and that judgment might be entred against all three jointly for the 35*s.* Rule to shew cause. *N. B.* This being moved, after the term wherein the judgment was given, the court refused it; and upon cause shewn by Mr. *Robinson*, the court said plaintiff might take judgment *de melioribus damnis* where several damages are given, or enter a *remittitur*; but taking damages for the whole makes the judgment bad in point of law, and we are of opinion it cannot be mended, for it is not a misprision of the clerk, but founded upon the verdict. *vide stat. Car. 2. and Comyns 284, 5.*

Anonymous. B. R.

Notice of motion must be to quash a writ.

UPON a motion to quash a *mandamus*, it was said by the court, you can never move to supersede or quash any writ whatever, without giving notice of motion.

Gwynne *versus* Hooke. B. R.

Whoever will take as heir male by purchase must be both heir and male.

HENRY *Dawes* being seised in fee of lands in Com' *Pembroke* died intestate, leaving three sons, *Griffith*, *Francis* and *Thomas*; *Thomas* died without issue in the life of his brother *Griffith*; *Griffith* the eldest son entred and was seised in fee, and married *Alice Pritchard*

Pritchard his first wife, by whom he had issue one daughter only *Phæbe*, who married *Griffith White*, by whom she had issue one daughter only *Elizabeth*, who had four husbands; 1st, *Thomas Lord Lort*, 2d, Lord Viscount *Bulkley*, 3d, *Thomas Ferrers*, and the 4th *John Hooke* the defendant, who claims under a marriage settlement made by his wife *Elizabeth*, the granddaughter and heir general of *Griffith Dawes*. *Griffith* married *Jane Bowen* his second wife, by whom he left no issue.

Francis Dawes the second son of *Henry Dawes* (the common ancestor) had issue two daughters *Judith* and *Margaret*; *Judith* married *Rowland Gwynne*, by whom he had two daughters *Dorothy* and *Priscilla*, two of the plaintiffs, and *Margaret* married *William Williams*, by whom she had *Elizabeth* the other plaintiff.

In November 1693. *Griffith Dawes* being seised in fee as aforesaid made his will, and (*int' al'*) gave the premises in question to his wife *Jane* during her life, and after her decease to my granddaughter the Lady *Bulkley* during her natural life, and after her decease to the right heirs male of me the said *Griffith Dawes* for ever; and having so made his will died in January 1693. *Jane* his wife entred and enjoyed the lands till March, 1693. when she died, then lady *Bulkley* entred and enjoyed the same, and on her marriage with *Hooke* the defendant in 1729. made a settlement under which he claims; *Francis Dawes*, the second son of the common ancestor, and only surviving brother of the testator, died in the life of lady *Bulkley*, who also died without issue 8th of May 1736, and thereupon defendant *Hooke* then entred under the settlement, and is now possessed.

The single question in this case is, what is the true meaning and construction to be put upon these words of the will, to the right heirs male of me the said *Griffith Dawes* for ever.

This was a case sent by my Lord *Hardwicke Canc'* to the judges of B. R. for their opinion, and was solemnly argued twice, the first time Pas. 16 Geo. 2. the second time in Mich. 17 Geo. 2. by *Probyn* and *Hume* for the plaintiffs, and *Wilbraham* and *Ford* for the defendants.

Probyn argued, that *Francis Dawes*, brother of the testator, being living at the time of the devise, might well take by the said words, which are descriptive of the person, and they are words of purchase in fee; that lady *Bulkley* could not take by them; she could not

Co. Lit. 9.
b. 10. b.
Prec. in Canc.
447. Brown
and Barkham;
he that will

take as heir male by purchase must not only be male but heir too. 1 Vent. 372. Pybus and Mitford. Eq. Caf. Ab. Baker and Wall. Pollex 457. James and Richards, Eq. Caf. Abr.

take

take a tail, because she ought in that case to be both heir and male, which she is not; she cannot take a fee by will because she is heir general, if she takes at all it must be by course of descent: in *Trin.* 8 *Annæ C. B.* 2 *Vern.* 736. Where a devise to his heir male, although neither heir of the body, nor heir at law, held good, (*sed N. B.* because by other words in the will it appeared testator did not intend he should be hindered from taking by his heir female) *Peere Wms.* 229. That heir male was a good description at common law, *Co. Lit.* 27. a. The word *male* is not to be rejected, it denotes the brother where there is a daughter. 3 *Rep.* 40. 1 *Lev.* 172. 1 *Vent.* 88.

Gurdon and Sheldon in Vaugh. 9 H. 6. 23. S. C. Bro. tit. Devise, p. 5 Shelly's case. 37 H. 8. Bro. 61. tit. Tail 33 Moore 136. Dy. 373. *Wilbrabam pro def'*: That the words are void for uncertainty, and nothing can pass by this devise, no one can be heir male, but he who is also truly heir at law; and in the case of *Counden* and *Clarke Hob.* 31. it is expressly laid down, that when the limitation is made, to heirs males or females, he or she that will take must have both words verified in him, or her, that is, that such person must not only be heir, but also male or female, as the limitation happens to be.

Co. Lit. 164. a. 24. b. Preced in Canc. 54. *Sterling and Etrick.* 3 *Salk.* Ford and Lord Offulton, Pas. 1708. Rot'lo 310. 2 *Peere Wms.* Dawes and Ferreirs. Prec. in Canc. 591. S. C. 442. and Vern.

Pollex. 457. James and Richardson. 2 Vern. 311. Burchet and Durdant. Prec. in Canc. 465. *Mich.* 17 Geo. 2. *Hume pro quer'*: That the intention of the testator is the best rule for construction of wills, 3 *Rep.* 20. *Boraston's* case; he made two questions; 1st, Whether *Francis* took any estate, and if he took any; 2^{dly}, What that estate was.

Beaumont and Long in Dom' procerum, Mich. 1713. Abr. Cas. in Eq. 214. V. opinion 10 Judges. And as to the 1st, The words right heirs male are a plain description of a person then in being, whom testator must mean by that description, and could be none but his brother *Francis*, who was then in being; 2^{dly}, He is entitled to a fee, for in a will the words *for ever* no doubt carry a fee-simple.

Ford pro def': I agree with Mr. *Hume* as to the general rule for the construction of wills as to the testator's intention; but must beg leave to add that such construction must be consistent with the rules of law. He that will take as heir male by purchase, must be both heir and male; this is a general rule, and I think there be but two cases where it can be departed from; the 1st, Where by the limitation to heir male there is somebody particularly pointed out; 2^{dly}, Or words to exclude the right heir; that a limitation to heirs male does not extend to collaterals, is laid down in *Coundall* and *Clarke*. If these words *to the right heirs male of me, &c.* were in a deed they would

would create a tail, as in *Beresford's* case. † I think if Lady Bulkley had had a son at the last moment of her life, such child might have taken by way of contingent remainder; and if *Francis* the brother took any estate at all, it must be a tail; in a deed, a limitation to one and his heirs males for ever would be a fee-simple, because uncertain of whose body such heirs shall be meant, but in a will it is a tail, because the intention of the deviser, and the court will supply the word body; and so held in *Ford* and *Ld. Ossulston*. *Francis* is dead without issue, so the estate descended to Lady Bulkley under whom defendant claims.

† The words of me the said G. D. denote of what body.

Hume: It is said that a son of Lady Bulkley might have taken as heir male by the words: but I deny that, for Lord Coke says, he who will take as heir male must convey his descent through all males, so that a son of a daughter cannot take.

Adjournatur.

Frampton versus Coulson B. R.

IN case upon a promissory note payable four months after date; judgment in *C. B.* by *nil dicet*; error brought, and upon common errors assigned, objected by Mr. *Cay* for plaintiff in error, that it is laid in the declaration, that the request to pay the money on the note was upon the same day and year the note is dated, which is four months before it became due; but answered by Mr. *Poole* *pro def* in error, that there is no occasion to lay any request at all; and so it was adjudged *per tot' cur'*, for the bringing the action is a request in law, and it appears that the action was not brought till above a year after the note was due, but if it had been necessary to have a laid a request, it appears in the conclusion of the declaration, that the plaintiff in error was often afterwards requested, which would be sufficient.

A request laid in the declaration to pay the debt before it is due is not material. Vide 1 Saund. 33. when it is material to aver a request.

Newcomb versus Green. B. R.

ACTION of covenant upon a deed; breach assigned for non-payment of 274*l.* 4*s.* 11*d.* defendant pleaded *non est factum*; Postea amended a verdict was given for the plaintiff, and the said sum in damages, but by mistake the associate had only marked on the postea 1*s.* damages; and now Mr. *Hussey* moved to amend the postea by the minutes of Judge *Burnet*, who tried the cause (upon the authority of *Cro. Car.* 338. *Elliot v. Skipp*, and *Bold's* case in *Salk.*) the judge having taken it down right. It was objected by Mr. *Clive*, who shewed cause that this was making a new verdict for the jury; he

Postea amended by the judge's notes. 2 Stra. 1197. S. C.

Salk. 53.

PART I.

K

also

also cited a case, *Pas.* 11 or 12 *Geo.* 2. *Ray* and *Lifter*, in debt on three several judgments, and damages laid in the declaration to 10*l.* the jury gave 30*l.* and judgment being entred for that sum, error was brought, and it was moved to amend the damages to 10*l.* but the court refused it; it was afterwards moved to remit 20*l.* but that also refused; but *per tot' cur'*, as to the case at bar, this is not altering the verdict, but rectifying a mistake of the clerk, and we will give more credit to the Judge who tried the cause, then to the clerk, and ordered the *poslea* to be amended.

N. Chapple J. cited *Fry v.* ——— *coram* *Ld. Raymond*; action for words, evidence given upon one set that were actionable, and by mistake a verdict being taken on a set not actionable, and great damages, the *Poslea* was altered by the Judge's notes.

Finney versus Finney. In Chancery, 15 Nov. 1743.

Parolevidence
to prove a
bond was
given in lieu
of dower re-
fused.

Q. Vizard and
Long, Mic.
5 Geo. 2.
Lawrence and
Lawrence
coram Lord
Somers, 1718.

THE plaintiff's bill was brought for dower, and to have a satisfied term which was set up against her at law removed out of her way; defendant by his answer set up a bond by the husband before marriage, conditioned to pay 400*l.* to the plaintiff's use in case she survived him, and suggested by his answer that *that* bond was agreed to be in lieu of dower; and he brought his cross bill upon that suggestion praying an injunction against her proceeding at law, in dower. *N. B.* The condition of the bond did not express it to be in lieu or satisfaction of dower, neither was there any written evidence to that purpose; the defendant in the original bill offered to read parol proof of the plaintiff's having often acknowledged that the bond was given in lieu of dower, but *per Ld. Hardwicke*, such proof cannot be read; so decreed plaintiff her dower.

Lucam versus Mertins. In Chancery.

Mortgagee for
lives cannot
compel mort-
gagor to fill
them up as
they drop, but
may do it
himself, and
add the ex-
pence to the
mortgage
money.

DECLARED *per Lord Hardwicke* *canc'*, that a mortgagee of an estate for one, two, or three lives, cannot compel the mortgagor to fill them up as they fall in, but he may do it himself, and add to it the mortgage money, and be allowed it when his mortgage is paid off.

Rex

Rex *versus* Howlett. B. R.

MR. Poole moved to discharge two rules for *certiorari's* to remove two orders of bastardy, application not having been made to the court for the said rules within six calendar months, as directed by *stat. 13 Geo. 2.* The motion was granted *per tot' cur'.*

Rule for *certiorari* to remove order of bastardy discharged because not applied for in six months.

N. one of the orders of bastardy was made before the said statute, so it was objected by Mr. Floyd that it was not within it; but *per cur'*, the words *had or made* in the statute have a retrospect.

Anonymous.

LUKE Robinson moved that the defendant in error might have leave to transcribe the record, (the plaintiff in error not having done it) in order to *non prof'* the writ of error, and to have the benefit of the recognizance entred into the bail upon the writ of error; but *per cur'* Chapple, Wright and Dennison, *absente Lee* C. J. it never was done.

The defendant in error cannot transcribe the record.

Wynne *versus* Wynne. B. R.

ERROR brought to reverse a common recovery with double voucher of lands in *com' Salop'*, wherein Sir Watkins William Wynne, Bart. was demandant, William Thomas tenant, James Apperley and Alathea his wife, first (and jointly vouched) vouchees, who vouched the common vouchee. By the record it appears that the writ of entry *sur disseisin in le post*, was returnable *quinden' Pas. 13 Geo. 2.* to which the tenant appeared in person, and vouched the said James Apperley and Alathea his wife, whereupon a writ of summons *ad warrantizandum* is awarded, returnable in *Craftino ascensionis Domini*, (which was on the 16th of May) *ad quem diem ven' tam præd' le demandant in propria persona sua quam præd' le ten' per attorn' suum et præd' J. A. & A. ux' ejus per Josiam Hodson attorn' suam similiter ven'*, and enter into warranty, and vouch over the common vouchee, who appears and pleads *quod præd' Hugo non disseisivit præfat' Watkin de le lands prout per bre' & narr' præd' superius supponitur & de hoc ponit se super patriam*; he then imparls and makes default, and thereupon judgment is given and a common recovery had, and a writ of *seisin* awarded, and the sheriff returns he has delivered *seisin*.

Post. The vouchee in a recovery dies before the return of the writ of summons *ad warrantizandum*.

The

The error assigned is, that *Alathea* died before the giving judgment in the said recovery, and for this the plaintiff in error prays the recovery may be reversed; issued joined that *Alathea* did not die before the giving the said judgment, which was tried at the summer assizes at *Salop'* 1741. and a special verdict taken, which finds the recovery as before stated with the mittimus and transcript of the *dedimus potestatem* to take the warrant of attorney of the vouches, and that *Alathea* died the 10th of *May* 1740. (which is six days before the return of the writ of summons) but whether she died before judgment or not, the jurors do not know, and so conclude in the usual form, leaving *that* to the judgment of the court.

Skinner the King's ancient serjeant for the plaintiff in error.

It appears by the record that the summons was returnable the 16th of *May*, and therefore judgment (as I contend) could not be given before that day; so the

1st Question will be, whether the death of *Alathea* found to be the 10th of *May*, will not vitiate and make the judgment erroneous?

2dly, What effect this finding of the jury shall have, and whether the court may not say that she did not die before judgment, and whether it can be made good by relation to the 1st day of the term.

I admit, my Lord *Coke* says, that records import absolute truth, the reason is, that there may be an end of controversies; I admit also that common recoveries are generally to be favoured, but at the same time, must insist, that the forms of proceedings thereupon ought to be strictly kept up and adhered to; and although the term is to be considered but as one day for the furtherance of justice, yet that rule is to be considered with many restrictions.

1. Whether the death of *Alathea* found to be on the 10th of *May*, does not make the judgment erroneous? suppose she had not prayed a *dedimus potestatem*, and had died before day given, there could not have been any further proceedings; but that it is erroneous, the case of Sir *Thomas Gower*, 2 *Vent.* 90. is exactly in point; and it is every day's experience upon motions to enter judgment on old warrants of attorney, the court requires an affidavit that the defendant is living; the conusor in a fine is not in court until the return of the writ of covenant. *Roe* and *Evelyn*, 2 *Sid.* 54, 92. and to proceed upon a fine, the conusor being dead before the return, is like building without a foundation; if vouchee dies before execution,

2 *Lev.* 127.
Comber. 57.
 71.
 3 *Salk.* 168.
Piggot 169.
Co. Lit. 52.

tion, I own, according to *Sbelly's* case, *fo.* 108. *a.* writ of seisin may issue. It was objected in the former argument, that the error assigned was averring against the record, but I insist, that this is a matter collateral, and being so, may be assigned for error.

21. *Mic.* 1734. *Da Costa v.* — Stat. 17 C. 2. cap. 8. made perpetual by 1 Jac. 2. c. 17. 305.
39, 20. *Dyer* 89. *Cro. El.* 463. *Cro. Jac.* 11. *Yelv.* 33. 4 Rep. 71. *Hind's* case. 9 Rep. 30.
Stat. 8 & 9 W. 3. c. 11. 1 Salk. 8. p. 20 H. 7.

2dly, Whether this judgment, by relation, shall be said to be given the first day of *Easter* term?

It is said the whole term is only one legal day; but that is a fiction, and *in fictione juris semper est aequitas, ut res magis valeat quam pareat*, 4 Rep. *Styles* 14. The very continuances in the recovery take away all presumption that the judgment was the first day of the term, for to say so would be to contradict the record; and *Lit.* says, the law is proved by the pleadings. 1 *Inst.* 115. Therefore as *Alathea* died the 10th of *May*, before the return of the writ of summons, and consequently before judgment, and as that judgment (I humbly contend) cannot be made good by relation, I pray the recovery may be reversed.

Draper serjeant *pro def.* in error: I admit that the death of the vouchee is a countermand of the warrant of attorney, but must add this question, can it be assigned for error on record?

There have been many cases cited to shew that the death of the vouchee before judgment may be assigned for error, but none of them come up to the case at bar; I will shew how they differ from it. In *Bro. Error*, 92, 165. it is laid down if death be assigned for error, the defendant must not plead *in nullo est erratum, mes doit respondre severalment car ceo est triable per pais*. Cases of death between *nisi prius* and day in bank; 2 *Bulst.* 241. a case relied on by the other side; S. C. in 1 *Roll. Rep.* 51. 1 *Roll. Abr.* cannot govern this case because given by statute, and therefore cannot operate at common law. And 1 *Roll. Abr.* 768. 1 *Roll. Rep.* 14. *Cro. Jac.* 356. *Cro. El.* 202. all these were upon motions to stay proceedings, and in one of them it appears the court could not stay the proceedings; the other cases are where it has been to stay the judgment, as 1 *Leo.* 187. 1 *Sid.* 1 *Mod.* 36. S. C. 2 *Bulst.* 262. *Sid.* 131. moved but not determined. *Sid.* 93. 1 *Mod.* 5. Cases on warrants of attorney to enter judgment, 1 *Vent.* 310. 1 *Salk.* 87. Such judgments are good when entered after the party's death; *Ray.* 18. *Andrew and Sewell.* *Farres.* 2. *Fuller and Jocelyn*; if death of the party could be assigned for error, what occasion to apply to the court; it is very remarkable that in all the books there cannot be found one instance wherever the death of the plaintiff or defendant hath been assigned for error, and the judgment there-

PART I.

I.

upon

Lit. Rep. 315. upon reversed for that error; where it appears by the record (as in
 1 Rol. Ab. this case) that any of the parties appeared on such a day, the death
 768. p. 2. of such party before that day cannot be assigned for error, because
 Poph. 132. contrary to the record; in the case of *Plummer* and *Webb & al*, in
 Daly. 17. S.C. debt on a bond *non est factum* was pleaded; *Webb*, one of the de-
 11 H. 6. 42. fendants, died before *nisi prius*; error was brought, and it was
 Dy. 10. held by this court, that the death of the said defendant before *nisi*
 1 Rol. Abr. *prius* was not assignable for error; *Ld. Raym.* 1414. another case
 756. like this, it appears by the record that *Alathea* was living, or she
 Cro. Jac. 11. could not have appeared by her attorney; and there can be no
 Cro. El. 665, inconveniency in making this record good, for the recovery was
 468. actually passed at bar before the death of *Alathea*.
 Cro. Jac. 521.
 Cro. Car. 53
 Sir T. Jones
 187.
 50 Ed. 3. 7.
 Jenk. 179
 Cro. El. 739. 28 Affis. 17. Rol. Ab. 783. p. 15, 16, 17. 19 Affis. p. 8. Bro. Error. 1 7. Vide Danvers.
 1 Rol. Rep. 301. Dy. 201. Skin. 39. Raym. 463. 2 Show. 173. 3 Mod 249.

If the assignment of error in this case be contrary to the record, the finding of the jury is also contrary to it, and therefore void, according to 11 H. 6. 42. for the record says that all the parties appeared in *Cro. Ascension' Domini*.

1 Bull. 161. The nature of this judgment of departure in contempt of the
 3 Salk. 213, court; it supposes that the common vouchee asked leave to go out
 280. of court; upon this imparlance he leaves the rest of the parties in
 1 Rol. Ab. court; the demandant might go out for a minute and return again
 583. l. 4. into court, and when he came he might ask, where is the vouchee
 Cases touch- that I may demand against him; who being gone out upon a general
 ing Fines, imparlance *et nemy al jour prefix, car la sur son default judgment*
 2 Sid. 94, 92. *final ferrà done quia recessit in contemptum cur', car sur general im-*
 2 Lev 127. *parlance le common vouchée ad impris sur luy destre tous foits pris*
 Comber. 57. *a defender son droit, set autrement est sur imparlance pris al jour cer-*
 71. *tain, lou petit cape tantum duit aver estre agandr. Yelv. 211.*
 3 Salk 168
 Cro. El. 468.
 3 Mod. 180.
 Farref. 2.

Whether this judgment appears by the verdict to be erroneous? the summons is awarded to be returnable in *Cro. Asc.* then the record goes on and says, at which day came the demandant and tenant, and the vouchees being summoned likewise came and vouched over; now if the word *before* had been put instead of *at*, this had been a good recovery without doubt, for the vouchee might not be summoned and yet might appear well enough by law, the vouchee might be standing near the court and hear what was transacting there between the demandant and tenant, and might hear himself vouched and a summons awarded, and thereupon might speak to an attorney then in court, *Sir, do you take care of this cause for me, and appear for me now.*

Whether therefore *Alathea* might not appear before the summons, and if so, whether she did or not? the time of appearance is not

not triable by the country *set per record coram les. justices*, 2 Roll. Abr. 574. p. 1. And nothing is more common than to file warrants of attorney 12 months after the judgment, and the time when filed is not assignable for error; and in *Hil. term*. 4 Geo. 2. *Manning and Brook* in *B. R.* so held, it was an action on the case, interlocutory judgment was of *Easter* term, final judgment of *Trinity* term, warrants for both parties were returned as filed of *Trinity* term; objected, that the defendant was out of court upon the interlocutory judgment, and therefore the warrants ought to have been of *Easter* term; but held, that by the common law warrants of attorney may be filed after judgment, and so the judgment was affirmed. The power to make attornies out of court is given by statute, and the common law was, that attornies should be appointed in court actually present; the *stat.* of *Carlisle*, 15 Ed. 2. first gave the *ded. pot.* to take warrants of attorney out of court; but that statute is only directory, and at the discretion of the court. *Ray*. 70, 1. and according to 1 Lev. 130. the vouchee might come in before the summons and make an attorney; and in *Sid.* 213. it is said the vouchee may come in by himself or attorney, though there be no process, and the appearance is not to the writ of summons but to the suit, the *ded. pot.* and warrant of attorney give no power to appear on the morrow of the ascension, but only *ad lucrand' vel perdend' in placito terræ*: in a common suit, defendant may appear before the return of the *capias*, and then the *capias* is out of the case, for the appearance is to the suit, and not to the *capias*; and notwithstanding this the judgment is of the first day of the term: if therefore the vouchees might legally appear before the summons, and they could not appear at the day, (in *Cro. Asc'*) what must be the import of this warrant of attorney; surely it must be, that they did appear before, and the plaintiff in error cannot aver against it.

Manning and Brook. Hil.
4 G. 2.

2 Bull. 114.
1 Salk. 88.
Stat. 23 Eliz.
c. 3. sec. 1, 5.

1 Lev. 130.
1 Sid. 213.
1 Keb. 748.
Fitz Vouch-
er 197.

The judgment in this recovery shall have relation to the first day of the term: the general intendment of the law is, that every judgment has relation to the first day of the term; the reason is, because the court cannot determine every suitor's case in one day, and term and vacation are as one day, and judgment shall have relation to the first day, unless there be a memorandum entred on the roll to the contrary; if a writ be brought against two executors, and abate by the death of one, and plaintiff sues out a new original by *journeys accounts*, all the proceedings relate to the teste of the first original so as to bind the assets. In *Smith and Raydon*, Mich. 12 Geo. 1. *B. R.* the court ordered a special memorandum to be made, in order to give the party leave to plead a tender.

Kelw. 166.
Viner's Ab.
Relation.
3 Salk. 230,
210.
Cro. Car. 102.
Healey 72.
Hutt. 95.
1 Bull. 35.
Dyer 220.
Co. Lit. 102.
a. b.
6 Rep. 10.
Spencer's
case.

As to continuances, there are several distinctions:

1. Between the commencement of the suit, and the continuance of it.

2. Be-

2. Between the continuance of process, and of the plea.

Spelman 96.
2 Lutw. 1142,
742, 1177.
Hil. 3 Geo.
Stonehouse
and Mullins.
Price and
Kendrick,
Bernardist.
Rep.

3. Between the continuance of plea from term to term, and from one return to another. This court has no jurisdiction till filing the bill, the process is only collateral; I know of no instance of the continuance of a plea from one return to another in the same term. In the case of *Martyn and Wyvourn*, Hil. 8 Geo. 1. action on S. S. contract and demurrer joined in Mich. 8 Geo. upon the 1st day of Hilary term, defendant pleaded *puis darrein continuance*, that the contract was not registred, which by the act of parliament was to be registred on or before the 1st of November; the plea was, that after the last day of Mich. term, and before the 1st of Hill. following, plaintiff entred continuances in Mich. term from day to day, so that this plea was not after the last continuance; the court being moved to strike out these continuances, declared them to be contrary to law, and parties are not to be harassed from day to day, but continuances must be from term to term. In Pasf. 15 Geo. 2. B. R. *elegit*, or *sci. fa.* against tertenants, judgment recovered on such a day, which was in the middle of Easter term; tertenants craved *oyer*, and on demurrer it was held good, and judgment for plaintiff, though it was objected it was not the same judgment, because in the middle of the term. If no continuance at all be entred from one term to another, yet if the parties appear the plea is continued, as in *Dobson* and *Dobson* B. R. upon error in dower upon a judgment by default there was entred on the record summon, &c. it did not appear whether there was any continuance, so objected, that for that cause it was error; but answered *per cur'*, that there needs no such entry, for the appearance of the parties at the day, was a continuance in law. If the continuance of the day be immaterial, as appears by *Kelw.* it is; what then says the *stat. 23 Eliz.* No recovery shall be, &c. what is this but a mistake of the clerk in writing *at* instead of *before*.

11 Rep. 5, 6.
Heydon's
case.

Kelw. 56. b.
3 Lev. 191.
2 Vern. 551.
1 Peere Wms.
91, 41, 90.
9 Rep.
Raym. 161.

It is objected that rules of court divide the term, rules are not records, only remembrances, not entred on the rolls of the court.

Skinner's reply: It is agreed common recoveries are favoured, that the death of a party is a countermand of the power of attorney; but it is objected such countermand cannot be assigned for error. My brother calls for a case; *Trevilcack* and *Harvey*, Trin. 5 Geo. 2. B. R. rot. 556. is in point against him; here is the record in my hand, my brother *Belfield* acquainted me he was for the defendant in error, so it did not pass *sub silentio* for old Mr. *Agar* was on the other side; *Alathea* could not appear before the summons. 1 Leon. 86. and the jury have found she died 10th of May, so she could not appear; my brother objected that case is not law, it was the clear opinion of all the Judges, and also of the prothonotary; but

Piggot 169.
1 Leon. 86.
Pasf. 32 Eliz.
Pasf. 12 Jac.
Lee v. —
Latch 92.

but says my brother, the appearance is not to the summons but to the suit; if she had appeared in person herself, I own that would have determined the authority of the attorney, but she did not: the very entry of continuances destroys the relation to the 1st day of term; and if the party could not appear till the return of the summons, then the word *at* is right. *Wynne and Wynne. Adjournatur.* Post. 42.

Anonymous.

MR Benne moved to discharge a rule for changing the *venue* from *London* to *Kent*, the action being upon a promissory note; but refused *per cur'*, although he cited several cases in the Common Pleas where it had been done, and bid him search precedents in this court. Venue cannot be changed in action on a note of hand.

Rex versus Watson & al'.

AN information was granted against the defendants for procuring one *Vine* a soldier, who had a settlement in the parish of *Brill*, to marry a poor woman who was an idiot and chargeable to the parish of *Dorton*, by giving *Vine* ten pounds and a fat hog for marrying her, whereby she and her child became chargeable to *Brill*; *Per Lee Ch. Justice, Wright and Dennison, absente Chapple: N. Pilsworth* who moved it, said he remembered a like case which himself moved in *Hil. 1735.* and there the court granted an information. *Rex v. Watson and Perrot*, overseers of the poor of the parish of *Dorton* in *Com. Bucks.* 8/3/629
Information against overseers for procuring a soldier to marry a poor woman chargeable to the parish.

Graham versus Benton. B. R.

JUDGMENT was recovered against defendant a bankrupt in the Palace Court for a debt owing before the bankruptcy, and defendant not being able to obtain his certificate before the said judgment, had no opportunity of pleading it, therefore to gain time and suspend execution, defendant brought error in the King's Bench, and judgment was thereon affirmed, whereupon he rendered himself in *custod' mar'*, and now having obtained his certificate, moved *per Mr. Benne* that he might be discharged upon the *stat. 5 Geo. 2. sec. 13.* which was read. Cause shewn by *Floyd and Stracey*; but *per tot' cur'*, defendant is discharged by the statute two ways, either by pleading his certificate if in time, or by applying to a Judge (after his certificate obtained) after judgment; though costs have been incurred after the bankruptcy, yet those and the debt are considered only as one debt, and execution could not be prevented but by bringing error. Bankrupt getting his certificate after judgment shall be discharged on motion.
Stat. H. 7. as to costs.

PART I.

M

Hilary

Hilary Term

17 Geo. 2. 1743.

Wynne *versus* Wynne. B. R.

LEE Ch. Justice delivered the unanimous opinion of the court, and made three points in this case:

Ante.
Post.

1st, Whether the death of *Alathea*, one of the vouchees before judgment, be error?

Vouchee dies
before the re-
turn of the
writ of sum-
mons, the
recovery is
erroneous.

2^d, Supposing it be error, yet whether by construction of law this judgment shall not have relation to the first day of the term, and whether the court will not intend the appearance of the vouchee *gratis*, and have no regard to the day given on the return of the summons?

3^d, Whether the plaintiff in error be not estopped to assign the death of the vouchee to be on the 10th of *May* before judgment, when it appears upon the face of the record that she appeared by attorney at the return of the summons, *viz.* 16 of *May*?

And we are all clearly of opinion with the plaintiff in error in this case, that the death of the vouchee before judgment is error; and 2^{dly}, That the judgment cannot be made good by relation to the first day of the term; and 3^{dly}, That the death of the vouchee is a collateral matter and not contrary to the record, and therefore the plaintiff is not estopped to assign it for error.

As to the first point, *vide F. N. B.* printed 1718. *fo.* 45. letter *B.* 2 *Inst.* 240. and that the vouchee is considered as tenant, *vide Bro. tit. error* 51, 131. *B.* 491. *Co. Lit.* 265. *Hob.* 225. It was said by defendant's counsel at the bar that this was not assignable for error, and for that purpose were cited 18 *Ed.* 3. 36, 38. 2 *Inst.* 245. But that the death of the vouchee does not abate the writ, *vide Jenkins* 179. *Theol. Digest. lib.* 12. *c.* 3. 2 *Rol. Abr.* 764. *p.* 2. 20 *H.* 7. *fo.* 10. That a remainder man may, as in this case,

bring error to reverse a common recovery, *Cro. El.* 739. *Holland Piggott* 169. and *Danfey, Godbolt* 379. 21 *H.* 6. 29. 2 *Jon.* 182.

2dly, We are all of opinion we must give judgment according to what appears to us upon the face of the record: now it appears that there was a writ of summons, and that all that was done by *Alathea* the vouchee was done by her attorney, and where there is a summons, the constant usage and rule of law is for the vouchee to appear by attorney. 1 *Leo.* 86, 291. the appearance therefore by the vouchee, as stated on the record, is right, as it ought to be by law; it would therefore be very strange for the court to suppose any other appearance when this is strictly right according to law, which is upon day given, viz. the return of the summons, at which day we are clear of opinion this judgment was given by the *C. B.* upon this record. When a vouchee appears in person at the return of the writ of entry, then the judgment is upon the return day of the writ of entry: but the writ of summons in the case at bar is the first process as to the vouchee; as to what has been said about relation and continuances it is all out of the case.

3dly, It has been urged that the death of the vouchee is contrary to the record, and therefore the plaintiff is estopped to assign it for error; and for that purpose has been cited 10 *H.* 7. 21. *Rol. Ab.* 86. 11 *H.* 6. 42. 50 *Ed.* 3. 7. *Cro. Jac.* 11. *Yelv.* 33. The rule of estoppels is (to be sure) that a man shall never be received to alledge any thing for error that is contrary to the record, but we are all clear that, in this case, the death of the vouchee is not contrary to, but a matter collateral to the record, and properly assigned and triable *per pais*, 4 *Co.* 7. for all that the record says, is, that the vouchee came by her attorney; it does not say any thing of her actual existence at that time, but puts a matter in issue properly triable by the country: If an infant vouchee appear in person infancy must be tried by inspection only, and during his nonage he may have error to reverse the recovery. Appearance in person and by attorney are very different, *vide* *Shelly's case*, *Comb.* 67. *Carth.* 367. *Hil.* 7 *W.* 3. *Walker and Stockow.* 1 *Sid.* 322, 392. 4 *Rep.* 71. 1 *Lev.* 80. 1 *Sid.* 93. *Ray.* 59. And *Ch. Justice* concluded with a saying of *Popham. fo.* 23. 2 *Ld. Raym.* 1415. this That gross absurdies ought not to be admitted in recoveries; and was going to pronounce judgment of reversal, but, upon the motion of Sir *John Strange*, judgment was respited till application should be made to *C. B.* to try to make the recovery right, last case does not contradict what *C. J.* says. 2 *Bull.* 243. *Post.* by some alteration. 2. What alteration.

Bradley

12 Mod 664

8 B. 132

Bradley *versus* Wyndham Sheriff of Hampshire. B. R.

A first fieri facias executed fraudulently, a 2d fieri facias at the suit of another executed afterwards shall stand and be preferred, and the matter was properly left to a jury.

ACTION for a false return of a *feri facias*; defendant pleaded Not guilty, and at the trial the plaintiff proved her judgment and *feri facias*, and *nulla bona* thereupon returned; it was also proved that one *Whiteball* was made special bailiff, and that the warrant upon the *fi. fa.* was directed to him, *Richard Harrison* and another; that one *Swanton* the plaintiff's attorney was present at the time of executing it, and ordered *Whiteball* to use the defendant *Crop* in that action kindly, and not to take any of his household goods, for that *Crop's* landlord, one *Earl*, would soon be in the country and pay the debt; so *Harrison* the bailiff rode round the farm and grounds and said, "I seize all this corn and cattle", (and took some account thereof) for the use of the plaintiff; this *feri facias* was tested the 11th of May, and executed the 14th of the same month 1742. in the manner mentioned.

Afterwards on the 20th of May, 1742. *Earl*, *Crop's* landlord, to whom he was also indebted upon a judgment, sued out a *feri facias* thereupon, and the sheriff's bailiffs not being in possession of *Crop's* goods, nor having left any body for them, as was proved, *Earl* got his execution executed; and there was no proof that *Earl* promised to pay the plaintiff; it was left to the jury upon this evidence, whether the execution that first came into *Crop's* house was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff. Mr. *Hentley* now moved to set aside the verdict; but *per totam curiam*, the Judge (*Burnett*) very rightly left the matter to the jury, and there is not the least foundation for a new trial, for the jury have determined the first execution fraudulent, 1 *Salk.* 320. *Carth.* 419. S. C. 5 *Mod.* 375. 1 *Ld. Raym.* 251.

Barber *versus* Dixon. B. R.

A custom for one commoner to inclose against another is good.

SPECIAL action upon the case, that whereas the plaintiff is seised of the rectory impropriate of *A.* and has a right of common in a certain field containing 110000 acres, and that the defendant inclosed part of that field, whereby the plaintiff could not enjoy his common in so ample and beneficial a manner as he before had enjoyed the same, to the plaintiff's damage.

The

The defendant pleaded two pleas, first the general issue not guilty, secondly, a special justification in bar that he was possessed of certain land in the said common field, and that it had been a custom time out of mind, for all those who had any lands in the said field to inclose as much thereof *ad libitum* as they pleased, and that the defendant by virtue of his possession, and of the custom inclosed; the plaintiff replies and traverses the custom to inclose, and thereupon issue is joined.

Where several pleas go each to the whole, if any of them be found for the defendant he shall have a general verdict.

This cause was tried at *Hertford* summer assizes 1742. before Baron *Reynolds*, who reported that the defendant upon the Not guilty put the plaintiff upon proving his declaration, which he did very satisfactorily, and then the defendant proved his plea in bar as fully, and thereupon the jury found a verdict for the defendant generally.

And now it was moved for a new trial; first, because the plaintiff ought to have had a verdict upon the issue of Not guilty; and 2dly, That this is a bad custom. But it was resolved *per totam curiam*, if there are several pleas pleaded, each of which goes to the whole declaration, and any one of them be proved, which absolutely destroys the plaintiff's action, a general verdict for the defendant, as in the present case, is very right.

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And 2dly, *per totam curiam*, this is a very good custom, and is in the nature of shack, and the freeholders under such a custom as this may well inclose one against another; and this is exactly like Sir *Miles Corbet's* case. 7 Rep. 5.

It was also said by *Lee C. J.* and *Denison J.* and not denied by the other two Judges, that in an action upon the case, as this is, this custom might have been given in evidence upon the general issue, for it proves the defendant not guilty of the *gravamen* laid in the plaintiff's declaration, and a defendant in an action on the case may give in evidence any matter that destroys the plaintiff's action; but that in an action of trespass *vi & armis* the special matter must be pleaded, and there the defendant must confess and avoid; but in an action upon the case it is otherwise. Cited *pro def.* 1 *Ld. Raym. Kent v. Wright.* 2 Mod. 274. *Cro. Car.* 432. *Pro quer.* 2 Mod. 104. 9 Rep. *Aldred's* case. 1 *Roll. Abr.* 239. 2 *Roll. Abr.* 682. p. 1. New trial refused, and judgment *pro def.*

In actions upon the case any thing may be given in evidence on the general issue, which will destroy the plaintiff's action.

Gomez ferra *versus* Berkley. B. R.

A note drawn by A. payable to B. or order for value received, B. pays it away to C. afterwards B. takes it up and pays C. the value, afterwards B. pays it to C. a second time, then B. fails, and C. brings an action against A. the drawer, and the jury find for the defendant because the note was once taken up and paid; but the court granted a new trial.

THIS was an Action upon a promisory note of 130 *l.* for value received, payable by defendant to *Collison* and *Lambert*, or order, and by them indorsed to the plaintiff; upon *non assumpsit*, this cause came on to be tried at *Guildball*, when the case upon the evidence appeared to be thus, *viz.* That this note was drawn by *Berkley*, and paid away to the plaintiff by *Collison* and C^o. that afterwards *Collinson* and C^o. took it back again, and paid the plaintiff his money for it; that after this, the plaintiff sold goods to *Collinson* and C^o. who a second time gave the plaintiff the same note for payment thereof; and afterwards *Collinson* and C^o. failing, the plaintiff brought this action against the drawer; and the jury gave a verdict for the defendant, because the note had been once taken up and paid: and now it was moved for a new trial, because this is a note for value received, and there was no evidence whatever that the plaintiff knew of any transaction between the defendant and *Collinson* and C^o. or whether this was a lent note by the defendant to them; for it appeared to the plaintiff that the defendant was still liable to *Collinson* and *Lambert*, when they paid the plaintiff this note a second time, and the plaintiff ought to stand in their place; and so it was held, and a new trial was granted *per totam curiam*.

Hull *versus* Pitfield. B. R.

If the drawer of a note be sued by the indorsee, and the bail for the drawer pays the debt and costs, this absolutely discharges the indorser, as much as if the drawer himself had paid off the note.

CASE upon a promisory note dated the 13th of *December* 1737. drawn by *Robert Scraiston*, whereby he promises to pay *Pitfield*, or order, the sum of 200 *l.* six months after date for value received; this note was indorsed by *Pitfield* to the plaintiff, who has brought this action against him as indorser; Upon the general issue this cause came on to be tried at *Guildball*, before *Lee Ch.* Justice, when this case was made for the opinion of the court, *viz.* That some time before the present action was commenced, *Hull* the plaintiff brought an action against *Scraiston* the drawer of the note, who gave special bail; that *Hull* recovered interlocutory judgment in that action against *Scraiston*, that thereupon *Scott* and *Ward*, who were his bail, paid off the debt and costs to *Hull*, which amounted to 220 *l.* 15 *s.* That thereupon the plaintiff executed an instrument between the plaintiff of the one part, and *Scott* and *Ward* of the other part, reciting the note, and that the plaintiff had recovered interlocutory judgment against *Scraiston* thereupon, and reciting that they the said *Scott* and *Ward* had purchased the note, and paid the said 200 *l.* and costs, and in consideration thereof the plaintiff assigned over to them the note and the interlocutory judgment, with power of attorney to make use of her (the plaintiff's) name to sue the

the indorfor, and covenants in the common manner, not to do any act to hinder *Scott* and *Ward* the bail from recovering the money upon the note. It was also stated in the case in what manner the note was given, which was thus: *Scraifston* wanting money draws the note payable to *Pitfield* or order, who, upon *Scraifston's* applying to him, lent him his name (as it is called) that is to say *Pitfield* indorfed the note, which being done *Scraifston* and *Pitfield* took the note, and applied to one *Russell*, agent for the plaintiff, to let *Scraifston* have money for this note, who thereupon lent *Scraifston* 187 l. 18. s.

This case was twice argued at the bar; first, in *Easter* term last, by Serjeant *Urlin*, Recorder of *London*, for the plaintiff, and Serjeant *Eyre* for the defendant, and in this term by Mr. *Clive* for the plaintiff, and Serjeant *Agar* for the defendant.

Two questions were made; 1st, Whether this note be not void by the statute of usury; and 2^{dly}, If it be not void, whether the plaintiff can have this action against the indorfor, the bail for the drawer in the former action having actually paid the debt due upon the note and costs to *Hull*.

As to the first question, the court said there was no occasion to give any opinion, but they all declared they were strongly inclined to think that the note was void by the statute of usury; and the reason they gave for being so inclined was, that it seemed by the state of the case that *Pitfield* was privy to the contract between *Russell* the plaintiff's agent and *Scraifston*, and that it seemed as if *Pitfield* and *Scraifston* were to be considered together as creating a joint security to the plaintiff, for it appears by the state of the case, that *Pitfield*, *Scraifston*, and *Russell* the plaintiff's agent, were all present at the time of the transaction of giving the note.

As to the second question, the court were unanimous that the payment of the money to the plaintiff by the bail, for the drawer, was the same thing as if the drawer himself had paid it, and that the note was thereby absolutely discharged and satisfied; and that what is laid down by *Holt* in *Hill v. Lewis*, 1 *Salk.* 132. is good law, viz. That by law generally every indorfor is always liable as the first drawer, and cannot be discharged without an actual payment, and is not discharged by the acceptance of the bill (or note) by the indorfee; but by the custom this is restrained, viz. The acceptance is intended to be upon this agreement, *scilicet*, That the indorfee will receive it of the first drawer, if he can, and if he cannot, then that the indorfor will answer it; as if the first drawer be insolvent at the time of the indorsement, or upon demand refuses to pay it, or cannot be found; and the indorfor is not discharged without actual payment, until there is some neglect or default in the indorfee,

The indorfee must endeavour to receive the money of the drawer before he can resort to the indorfor.

indorsee as if he does not endeavour to receive the money in convenient time, and then the first drawer becomes insolvent.

And the court resolved in the case at bar, that the indorfor of a note is only a warrantor thereof that the drawer will pay it, and if he does not that the indorfor will; and that it is the same thing whether the drawer himself paid the money or his friend, as the bail did in this case; and *Kellock v. Robinson*, Hil. 13 Geo. was cited by Lee C. J. and *Denison*, and not denied by the other two Judges, which was an action by the indorsee of a note against the indorfor; and it appearing that the plaintiff after the indorsement had received of the drawer some part of the money due upon the note, *Eyre Ch. Justice at Guildhall* held, that the indorsee had thereby taken upon himself to give the drawer credit for the whole, and had discharged the indorfor absolutely: and the plaintiff in that case was nonsuited. Judgment for the Defendant, and the *postea* ordered to be delivered to him, and to have costs of a nonsuit.

2 Stra. 745.

If the Indorsee receives part of the money upon a note of the drawer, the indor or is discharged.

Easter Term

17 Geo. 2. 1744.

John Leyburn Witham, Esq; Plaintiff in Error, and George Lewis, on the demise of Edward Earl of Derby, Defendant in Error.

GEORGE Lewis brought an ejectment in the King's Bench for 500 acres of land, 50 acres of meadow, 400 acres of pasture, 600 acres of wood and 500 acres of moss with the appurtenances in *Wither Slack* in the county of *Westmorland*, upon a lease made by *Edward Earl of Derby* aforesaid to *George Lewis* on the 19th day of *January* in the 12th year of his present Majesty for seven years from the 18th day of the same month of *January*; upon the issue of Not guilty, this cause was tried at *Appleby*, and the jury found a special verdict to the effect following, viz.

That

That King *Henry* the 7th being seised in fee of the premisses in question, on the 26th of *February* in the 4th year of his reign, reciting, that whereas the said King on the 27th day of *October* in the first year of his reign, had created *Thomas* then Earl of *Derby*, late Lord *Stanley*, for divers his services to the said King done, Earl of *Derby*, to be Earl of *Derby*, to him and the heirs male of his body, and that he might honourably maintain his state and dignity of Earl of *Derby*, the said King had given and granted to him and his heirs 20*l.* per ann. out of the vicontiel rents of the county of *Nottingham* and *Derby*; and reciting, that whereas the said Earl of *Derby* had released to the King the said yearly annuity, therefore he the said King, for the more honourable support and maintenance of the state and dignity of the said Earl of *Derby*, gave and granted the manor of *Witherslack*, and the lands in the declaration mentioned, to the said *Thomas* Earl of *Derby* and the heirs male of his body, who entred and became seised thereof.

That *Thomas* Earl of *Derby* had issue *George* Lord *Strange*, who died in the life-time of his father, but left issue *Thomas* his eldest son: that *Thomas* Earl of *Derby* died seised, and that *Thomas* his grandson, after his death, entred and was seised thereof.

That *Thomas* the grandson being so seised in *Trinity* term, anno 5 *Hen.* 8. suffered a recovery with single voucher, wherein *James* bishop of *Ely* and others demandants, impleaded the said *Thomas* Earl of *Derby*, and demanded the premisses in question against the said Earl, whereupon it was adjudged that the said demandants should recover seisin of the premisses against the said Earl, &c. prout the exemplification of the record of the said recovery to them produced in evidence; and then they find that after the said recovery so as aforesaid prosecuted and had, the said *Thomas* Earl of *Derby* entred into the said premisses and was seised thereof.

(But *N. B.* The jury do not find that a writ of seisin was awarded or ever issued, or that the judgment in the recovery was ever executed).

But they next find that *Thomas* the grandson being so seised died, leaving issue of his body *Edward* his eldest son, who entred and became seised of the premisses as the law requires.

That *Edward* had issue male of his body *Henry* his eldest son, that *Edward* died seised, and that *Henry* entred into and became seised of the premisses as the law requires.

That *Henry* had issue male of his body *Ferdinando* his eldest son, and *William* his second son; that *Henry* died, and *Ferdinando* entred

into the premisses and became seised as the law requires; that *Ferdinando* died seised in the life-time of his brother *William* without issue male of his body, leaving only three daughters, *Ann*, *Frances* and *Elizabeth*.

That *William* after the death of *Ferdinando* entred into the premisses and had issue *James* his only son.

And the jurors further find that after the death of Earl *Ferdinando* several controversies and disputes having arisen, as well touching the right and title of, in and to the several manors, lands and hereditaments of the said Earl, as also touching the portions and advancements of the said daughters: for determining the said disputes the same were referred to the arbitration of several noble persons, who made an award, by which the several disputes amongst them were settled; which award, at the desire of the said Earl *William* and the said three daughters, was afterwards established and carried into execution by an act of parliament made the 4th of King *James* the first, at the petition of all the contending parties; by which the manor of *Witherslack* (of which the premisses are parcel) amongst other lands is given and limited to the said *William* Earl of *Derby* for and during his life, and after his decease to *James*, son and heir apparent of the said Earl *William* and the heirs male of his body, and then to the second son of the said *William* and the heirs male of his body; and in default of such issue to the third, fourth, fifth, sixth and seventh sons of the said *William*, and the heirs male of their several bodies respectively and successively; and in default of such issue to Sir *Edward Stanley* for life, and after his death to the first, second, third, fourth, fifth, sixth and seventh sons respectively of the said Sir *Edward* in tail male: and in default of such issue to *Edward Stanley* of *Bickerstaff* in the county of *Lancaster* for his life, and after his decease to his first, second, third, fourth, fifth, sixth and seventh sons in tail male, in like manner as the lands are limited to Earl *William* and his sons, but in none of them is the limitation carried farther than the seventh son.

Then there is a proviso in the statute that saves all rights and reversions in the crown or others in like manner and plight as if the said statute had not been made, and also saves the rights of all other persons except such as took estates by the said act.

Then the jurors farther find, that Earl *William* being so seised of the premisses died seised, whereupon *James* his son entred by virtue of the estate limited to him by the said act of parliament.

That *James* died seised thereof, and that *Charles* his eldest son and heir male entred into the premisses and became seised thereof.

Then they find that Earl *Charles* by feoffment, bargain and sale in 1653. and fine with proclamations in *Michaelmas* term 1654. and warranty, for a valuable consideration sold the premises to one *John Leyburn*, Esq; and his heirs; by virtue whereof *John Leyburn* entred and became seised, and he being so seised, on the 19th of *January* 1679. died seised of the premises, and that the same descended to his son *Thomas Leyburn*.

Then they find that *John Leyburn Witham*, the plaintiff in error, derives his title to the premises from and under the said *Thomas Leyburn*, and that the said *John Leyburn Witham*, and all those whose estate he hath in the premises under the said *John Leyburn* and *Thomas Leyburn*, were in actual and peaceable possession of the said premises ever since the making of the said feoffment, bargain and sale, and levying the said fine until the 17th of *January* 1738.

Then they find that the said Earl *Charles* died in 1672. leaving issue *William-George-Richard*, and *James*, whereby the said *William-George-Richard* became and was Earl of *Derby*; that the said *William-George-Richard* died in 1702. without issue male in the life-time of his brother *James*, who thereby became and was Earl of *Derby*, and died in 1735. without issue male.

Then they find that Sir *Edward Stanley* of *Enston* died in 1632. without issue male.

Then they find the descent of the present Earl of *Derby* from *Edward Stanley* of *Bickerstaff* in the act mentioned, and that the present Earl of *Derby*, the lessor of *George Lewis*, is heir male of the body of *Edward Stanley* of *Bickerstaff*, and also heir male of *Thomas* the first Earl of *Derby*.

Then, before the demise made to *George Lewis*, they find an actual entry made into the premises by the now Earl of *Derby*, and then make the general conclusion, whether the Earl had a right of entry or not, and refer it to the judgment of the court; and if they should be of opinion that he had a right of entry, then they find for *Lewis* the plaintiff below, if not, for the defendant *Leybourn* below.

At the trial of this cause the exemplification of the recovery 5 *Hen. 8.* was given in evidence, and at that time no objection was made to it; but the only doubt then which occasioned the finding this special verdict was, whether the entry of the defendant in error was lawful or not.

Which

Which depends upon this question, *viz.* Whether, notwithstanding the recovery suffered 5 *Hen.* 8. the feoffment and fine of Earl *Charles* in 1653 and 1654. made a discontinuance or not? for if they did, the entry of the present Earl the defendant in error was taken away.

But it was insisted on behalf the Earl, that the feoffment and fine in 1653. did not discontinue his remainder, for that the reversion being ultimately in the crown protected it from such discontinuance.

To which it was answered that it did not, because a reversion in the crown to prevent a discontinuance, must be a reversion immediately dependant on the estate-tail attempted to be discontinued, which this is not; because by the recovery of the 5 *Hen.* 8. the old estate-tail was barred, and turned into a fee-simple descendible to Earl *Thomas* and his heirs general, as long as there were heirs male of the said *Earl* subsisting; and the reversion thereby left in the crown became only a mere possibility of reverter after the determination of such qualified fee, and consequently not within the protection of 34 *H.* 8. which extended only to estates tail *then* subsisting, which this was not; for that *stat.* only says that no feigned recovery *hereafter* to be had against tenant in tail of lands, whereof the reversion or remainder at the time of such recovery had shall be in the King, shall bind, &c. and as to the estate-tail created by the settlement confirmed by the *stat.* 4 *Jac.* 1. That it was only a partial estate-tail created out of the fee-simple gained by the recovery. 5 *Hen.* 8. and the reversion being left in the crown by that *stat.* in the same plight as it was before, it was in no sort made dependant upon or connected with the estate-tail then created, but left to depend, as it did before, on the fee-simple gained by the recovery. 5 *Hen.* 8. which might possibly subsist many generations after all the estates-tail created by that act were spent; and that therefore the fine and feoffment of 1653 and 1654. made a discontinuance of the remainder limited to the present Earl, as they could not, nor did at all affect the reversion of the crown, betwixt *which* and the remainder in tail there was no privity or dependance.

But upon this point, though argued three several times before the court of *B. R.* they gave no opinion, for upon arguing the case, the counsel for the defendant in error raised a new objection, *viz.* That no writ of seisin, or entry of the recoverers appeared upon the special verdict, and that as it was *not found*, it could not be presumed, and therefore the recovery was not good, and of consequence the entry of the Earl of *Derby* was lawful; and the court of King's Bench

Bench being of that opinion, gave judgment for *Lewis* the plaintiff upon that point only.

Upon which judgment the plaintiff *Leyburn* has brought this writ of error; and upon the argument it was in the first place insisted by his counsel that the same is erroneous, and that the writ of execution, and the execution thereof, though not expressly found by the jurors, ought to have been presumed for these reasons:

1. From the exemplification of the recovery as found, it's antiquity of above 230 years, it's being entred on the rolls, the dignity and quality of the parties to it, and a fresh entry of Earl *Thomas* expressly found to be made *after* such recovery.

2. From the impossibility of any other proof of actual execution; for it is well known that amongst the rolls of recoveries of *that* and the preceding reigns, the award of the writ of execution is not entred or indorsed upon one in twenty of them, (as has been usually done of late years) and upon search in the proper offices, where the writs of execution themselves ought to be filed, not one of such antient writs is to be met with.

3. Because had any objection been made at the time of trial, to the recovery upon this matter that no execution appeared to be awarded or executed, the Judge of *nisi prius* it is apprehended would and ought to have directed the jury to find the execution of it, from the antiquity of the exemplification itself, and the possession of the Earls of *Derby* under it; and if so, it seems reasonable that the courts of law should draw the same legal conclusions, and make the same reasonable implications from facts themselves, which they would direct a jury upon their oaths to do.

4. From the sale itself by Earl *Charles* in 1653. and the acquiescence of his two sons Earl *William-George-Richard*, and *James*, successively for near fourscore years together.

5. From the bad consequences which may attend this judgment; for if this doctrine should be established, that the Judges are not to presume execution at this distance of time, it might shake the titles of great part of the property of this kingdom, which probably may depend on the validity of antient recoveries suffered before the *stat.* 34 *Hen.* 8. for if a jury (for any reasons peculiar to themselves) should think proper to insist upon evidence to support such antient recoveries, (which for the reasons above appears to be impossible to be laid before them) as no attain or other remedy against them would lie in such case, all property, under these circumstances,

PART I.

P

might

might be subjected to an arbitrary, and perhaps corrupt determination of a jury without any redress whatever.

And 6thly, From the length of possession transmitted from ancestor to heir in the *Leybourn* family, and so expressly found by the jury in a series of quiet, peaceable and uninterrupted enjoyment, for the compass of near 100 years together.

But admitting that the court of King's Bench ought not in strictness of law to have presumed the writ of execution as the jury have not expressly found it, yet it was in the 2d place insisted by the counsel for Mr. *Witham* that this is, at most, but an imperfect verdict, and that therefore no judgment ought to have been given thereon, but a *venire facias de novo*, that is to say, a new trial ought to have been awarded and granted, which the court of King's Bench, upon a motion for that purpose, refused; because they were of opinion that a *venire facias de novo* can only be granted upon what appears to the court upon this record, viz. that unless it thereby appears that the verdict is so imperfect that the court cannot give a complete judgment upon it, it would be error to grant a *ve. fa. de novo*, 8 Rep. *Loveday's* case. And they were of opinion that it is not the verdict but the defendant's title that is imperfect, and they could not say, from any thing appearing in the verdict, that the jury had misbehaved themselves, and yet that must be the introduction to a *ve. fa. de novo*, as they said.

In answer to this it was now said by the counsel for Mr. *Witham* that 1st, It was the office of the jury to have found the fact of execution oneway or the other, and not to have submitted that question to the court, because the court cannot legally presume either way, and they have misbehaved in that part of their office, the record therefore ought to be sent back to them to do their duty in this particular.

And 2dly, If complete justice cannot be done to the parties upon this record, it is apprehended a complete judgment cannot be given upon it; and the whole merits of this case depending upon the question, whether execution was awarded or not, as the jury have not with certainty found either way, but submitted it as a question to the court; and supposing the court cannot in strictness of law presume there was execution, surely they cannot determine there was not, when it is more reasonable to presume the other way; and therefore they prayed the judgment might be reversed, and that a *ve. fa. de novo* might be awarded.

But notwithstanding these reasons and arguments, the judgment of the King's Bench was affirmed, and a *venire facias de novo* was refused,

refused, according to the unanimous opinion of Lord Chancellor *Hardwicke* and all the Judges, which was delivered to the following effect, by Lord Chief Justice *Willes*.

Lord Ch. Just. *Willes*: Two questions are made for the opinion of the Judges: 1st, Whether sufficient matter be found by the special verdict for the court to say this recovery as found, without seisin awarded or executed, is a good and valid recovery. 2^d, If not, whether by law, a *ve. fa. de novo* ought to be awarded?

A recovery found by a special verdict without any seisin given is invalid, and no bar; and a *ve. fa. de novo* shall not be awarded.
2 Stra. 1185.
S. C.

The first question naturally produces two others; 1st, Whether a judgment in a recovery not executed, is of any force or validity? 2^{dly}, If not, whether this verdict has found sufficient for the court to intend it? As to the 1st of these questions there can be no doubt; it is a settled principle that a judgment in a recovery not executed has no manner of operation; *Shelly's case*, Sir *Wm. Jones* 10. Judgment in a recovery not executed, will not alter the nature of the estate: there is no case where there is the least insinuation to the contrary; this being so, let us consider the 2^d part of the question, whether execution can be presumed? the verdict finds the recovery only, not a word of any writ of seisin, and there is nothing more settled than that the court can intend nothing in a special verdict but what is found by the jury; *Hob.* 262. (who was as great a man as ever lived) expressly to this purpose; and there is this very good reason for it, the rule of law would otherwise be inverted, for *ad quæstionem facti non respondent iudices, ad quæstionem juris non respondent juratores*, 1 *Inst.* 155. b. therefore we are of opinion there is not sufficient matter found upon this verdict to intend this a good recovery. The next question then is, whether by law a *ve. fa. de novo* ought to be granted; this is a much more doubtful question; I will explain the nature of the *ve. fa. de novo*, and that will best shew the reason of our opinion; the counsel at the bar endeavoured to confound a *ve. fa. de novo* and a motion for a new trial, but they are very different things, they agree indeed in some things, but differ in many; they agree in this, that a *ve. fa. de novo* must be awarded in both, and that the court may or may not grant either of them; but they differ 1st in this, that a *ve. fa. de novo* is the antient proceeding of the common law, a new trial is only a new invention; the 1st is as antient as the law, when attaints were in use, but motions for new trials were introduced in this manner; the judgment in attaint was very severe, and the punishment excessive hard, and therefore to avoid *that* severity it was thought better to proceed in a milder way, and so motions for new trials were introduced; they likewise differ in this respect, that new trials are generally granted where a general verdict is found. A *ve. fa. de novo* upon a special verdict; but the most material difference between them

Plowd. 43. b.

them is this, that a *ve. fa. de novo* must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it; if the record be never so right; if the verdict appear to be contrary to the evidence given at the trial, or if it appear the judge has given wrong directions, a new trial will be granted; but it is otherwise as to a *ve. fa. de novo*, which can only be granted in one or other of these two cases; as 1st, If it appear upon the face of the verdict, that the verdict is so imperfect that no judgment can be given upon it; 2^{dly}, Where it appears that the jury ought to have found other facts differently, and it cannot be granted in any other case; the best way of explaining these rules, will be by instances, and I will mention two, upon the head of imperfect verdicts; *The Mayor and Corporation of Shrewsbury v. Corbett Kinaston*, about six years ago: that was a *mandamus*, whereupon there were pleadings to issue, a special verdict was found, and error brought, and it was insisted that neither upon the verdict, nor judgment, was there any damages taken, and therefore that it was so imperfect that a *ve. fa. de novo* must be awarded: the next instance was *Chalie v. Haswell* in February or March 1740. which was a prosecution for selling wine by retail, and upon the first opening it was found there must be a *ve. fa. de novo*, because of the imperfection of the verdict, the act of parliament it was founded upon having particularly mentioned retail measure, as quart, gallon, &c. and the verdict only found that he sold wine by bottles, without taking any notice of the measures in the statute, which was so imperfect, that the court could not give any judgment upon it, for no body could pretend to say of what measure the bottles were: as to the second head, where it appears upon the face of the record itself, that the jury ought to have found otherwise; I will likewise mention two instances, indeed not of so high authority as the other cases, but such as are undeniable; the 1st is in an action of trover; if the jury find a special verdict that the goods were demanded of the defendant by the plaintiff, and defendant refused to deliver them, a *ve. fa. de novo* ought to go, because the jury have found only the evidence of a fact, which they ought to have determined, for demand and refusal are only evidence of a conversion, and they ought to have found a conversion. The second instance upon this head is, the case of the corporation of *Maidstone* about the year 1738 or 1739. in *B. R.* there the jury found the evidence of a fact, which shewed they ought to have found the fact itself: Now try this case by these rules; it was not contended by the counsel in the argument of this case that the present verdict is imperfect, therefore it is plain there is sufficient found for the court to give judgment upon: The question therefore is, whether the jury ought to have found otherwise; and first it is said that it is found that *after* the recovery, *Thomas Earl of Derby* entred and was seised *prout lex postulat*, and therefore the jury ought to have found execution; 2^{dly}, That the jury have not found the

contrary

contrary, that there is no execution; and 3^{dly}, They rely upon the length of time and possession: as to the 1st there is no evidence of the execution, not the least proof of it, *de non existentibus & non apparentibus eadem est ratio*, the case of *Awbery and Bridgwater*, Sir *W. Jones* 10. is a much stronger case than this; there it was pleaded that *Thomas* entred *secundum recuperationem præd'*, &c. and held that this was bad; much less will this finding do, which is only, that he entred *after* the recovery so as aforesaid had; besides, it is plain he did not enter by virtue of the writ of seisin, for the recoverer is to have the writ of seisin; this was before the statute of uses, and he would have had only a trust and no legal estate: as to the 2^d objection there is much less weight in *that*, for to say that the jury ought to have found expressly the contrary, *that there was no execution*, would be to say they should find a negative, which, in my opinion, they cannot do in any case; to mention cases out of the books upon this head, would be rather to confound than explain; but the better authorities agree they cannot, *Hob.* 262. The case of *Duncombe v. Wingfield* is express that it would be against sense to enforce a jury to find a negative of *that*, that is not presumed except it be found; it is a maxim in divinity, that if a man tells any thing ever so true, if he does not know it to be true at the time he tells it, it is a lie; how then can the jury say it was not executed when there was no evidence of it; and as they have found this recovery, the presumption is that it was not proved there was any seisin; the 3^d point insisted on is the length of time and possession; it is hard to say how this came about that they were permitted to continue so long in possession, perhaps it might be owing to the same reason which has occasioned this recovery being found in this manner, the point might not be thought of at all; I am very doubtful of this, and give no opinion; for these reasons we are all of opinion that this case does not come within any of the rules for granting *ve. fa. de novo*; but consider the circumstances of this case, in the first place this judgment is not conclusive, no harm done, the plaintiff in error may bring a new ejectment; upon this foundation there are many cases where new trials have been refused: but it is said, the defendant is poor, *that* will have no influence upon the judgment of the court, in a matter of law; 2^{dly}, As far as you can you will look to the final right and justice of the case, there is not any pretence of right; plaintiff in error claims under a fine of 1653. a discontinuance does not give a man a right, so that if there be any hardship in the case it is upon the family of Lord *Derby*, who have been thus long kept out of the possession of this estate, which *Witham's* ancestor gave only 130*l.* for; this being so, it is a reason for refusing a new trial. *Salk.* 644. no new trial against the equity of the case 646, 647. new trial refused for omission of the party, because an honest debt, if a *cestui que trust* bring an ejectment against a wrong-doer, and the jury find for him, the court will not set it aside, because of the final justice of the case.

PART I.

Q

Cayhill

Cayhill *versus* Fitzgerald. B. R.

6.C. Ante 28.
Award.

1 Salk. 70

2 Salk. 787.

Carth. 412.

1 Ld. Ray.

746.

Yelw. 137.

147. Talbot.

v. Godbolt.

2 Mod. 231.

1 Ld. Ray.

533.

Stiles 351.

2 Moa. 227.

2 Ray. 961.

THIS case was this term argued again by serjeant *Draper* for the defendant, and *Hume* the King's counsel for the plaintiff, when two objections were made to the award, by *Draper*, 1st, That it was not of the matter submitted; and 2^{dly}, That it was not mutual between the parties, as in the former argument, ante 28. and now the court gave judgment for the plaintiff, and held the award good in both these points.

Lee Chief Justice: This is debt on bond; the condition is, that *Geo. Fitzgerald* Jun. acting as attorney for and on behalf of *John Fitzgerald*, became bound to plaintiff to submit to the award of certain arbitrators to be made within such a time touching all matters in difference between the plaintiff *Cayhill* and *John Fitzgerald*, and defendant after oyer pleaded no award; plaintiff replied and set forth an award published and declared by the arbitrators, which was of and concerning the premises in the condition of the bond specified, and that they thereby awarded that *Geo. Fitzgerald* should within ten days from the date of the award pay or cause to be paid to *Michael Cayhill* (the plaintiff) 298*l.* 9*s.* 9*d.* and that *Cayhill* should take the same in full of all demands; and further, that each of the parties should sign, seal and execute a general release from the beginning of the world to the date of the bond, and then assigned a breach, and to this there is a demurrer and joinder; I own, when this case was first argued, I was inclined to think this award was bad upon reading *Carthew's* report 412. of *Bacon* and *Dubarry*; but upon looking into Lord *Raymond's* report of the same case, and also a manuscript report thereof, which I have since seen, I am now clear of opinion that this is a good award, and the case at bar is not to be differenced from *Bacon* and *Dubarry*; and so it appears in the pleadings in that case in 2 *Salk.* for if the award there had been general, as in this case, and not *ad usum eorum alterius* (which confined the same to the attorney) it would have been good; for it appears upon the record in this case, that the award has relation to what was submitted, for though not expressly mentioned in the award itself, yet it appears on the record that it is made of and concerning the premises in the condition of the bond, for it is expressly averred so to be, in the replication; so *per tot' cur'*, judgment for the plaintiff, for this award is within the submission, is final and mutual.

Recovery refused to be amended.
Ante 35.

In the case of *Wynne* and *Wynne*, ante—the court of C. B. was moved for leave to amend; the 1st amendment desired, was to alter the words, at which day the vouchee appeared by attorney, to “Before which

“ which day, to wit, on the 15th of May,” which was refused, because *per opin’ cur’* the vouchee cannot appear before the return of the writ of *sum’ ad warr’*, 1 *Leo.*—so it would be amending one error by making another. 2d amendment prayed was to alter the *teste* and *return* of the writ of entry, but refused, because against law, and there is nothing to amend by; as to the cases cited for the amendment of the *teste* in *Pigott*, they were taken by the court to be by consent, because by the rule in the first of them it appears to be so, and the others about the same time; most of the cases cited besides, were of amendments in the *returns*, but agreed *originals* were amendable by *stat. H.*—in their *teste*, where it is the misprision of the clerk only, and this, the cases cited only prove, but not amendable for the ignorance or nescience of the clerks, *Gage’s* case in *Co.* which they said had been denied to be law several times; and *Blackmore’s* case of amendments warrants this distinction, but here is neither misprision nor ignorance of the clerk, supposing *Gage’s* case to be law, for here is a proper *teste* and *return*, and as intended to be; and the court thought, from the release to lead the uses of the recovery, which is the only thing they could amend by, there appeared no intention of the parties that a writ of entry should be sued out sooner than it was. Rule for amendment discharged, *Pas.* 18 *Geo.* 2.

Box *versus* Day and his Wife. B. R.

THIS is an action of debt upon a bond which was executed by the wife of the defendant *dum sola*; the defendant craved *oyer* of the condition, which was in these words: Whereas a marriage has for some time been and now is declared and agreed upon, and is intended to be had between the above named *Thomas Box* and *Frances Middleton*, but the same, at the request of the said *Frances*, is to be deferred until the death of *John Middleton* her father; and the said *Thomas Box* and *Frances Middleton* have mutually engaged themselves not to intermarry but with each other; in consideration whereof, and for a provision for the said *Thomas Box*, in case the said intended marriage shall not take effect, and that the said *Frances Middleton* should intermarry with any other person, or die before the intended marriage, or refuse to marry the said *Thomas Box*, upon or immediately after the death of the said *John Middleton*, she the said *Frances Middleton* hath agreed that the said *Thomas Box*, his heirs, executors, or administrators or assigns, in either of the cases aforesaid, shall have, take and receive out of the fortune and estate of the said *Frances Middleton* 1200*l.* and interest, at 5*l.* *per cent.* *per ann.* from the date hereof: now the condition of this obligation is such, that if the above bounden *Frances Middleton*, her executors, administrators or assigns, do within one month after her inter-

Condition of a bond not to marry any other but the plaintiff, and to pay 1200*l.* in case she did so, or refused to marry the plaintiff within a month after her father's death. She marries another man, her father being alive, the bond seems to be forfeited and the money payable.

intermarriage with any person whatsoever, except the said *Thomas Box*, or within one month after the death of the said *John Middleton*, pay to the said *Thomas Box*, his executors, administrators or assigns 1200*l.* within interest at 5*l. per cent.* from the date hereof; or if the heirs, executors or administrators of the said *Frances Middleton*, do within one month after the death of the said *Frances Middleton*, pay to the said *Thomas Box*, his executors, &c. 1200*l.* with interest, then this obligation to be void, or else to remain in full force; which being read and heard, the defendants plead that *John Middleton*, the father of the defendant *Frances*, is now living, (to wit, at such a place) and this they are ready to verify, &c. The plaintiff demurs generally to this plea, and the defendants join in demurrer.

This case was now argued by Mr. *Poole* for the plaintiff, that the plea is bad; and insisted that the defendants ought to have pleaded that none of the contingencies mentioned in the condition have happened, for if any of them have happened, *viz.* If *Frances Middleton* has married any other person but the plaintiff, then the bond is forfeited, unless the 1200*l.* and interest be paid; and he cited *Sayer v. Glean*, 1 *Lev.* 54. wherein it is said the law will supply the words, "which shall first happen" and relied on this case as directly in the very point.

Mr. *Henly*, in arguing for the defendants, chiefly insisted that it is a rule laid down in 5 *Rep.* 21. b. 22. a. which has always been adhered to, that where a condition is in the disjunctive, the obligor has his option to perform which part of it he pleases, for the condition is made for the benefit of the obligor, and shall be taken beneficially for him, and therefore it is at the election of the defendants to pay the 1200*l.* and interest at the death of *John Middleton*, and concluded the plea was well enough.

Mr. *Poole* in his reply admitted, that where the condition of a bond is to do one act or another, or at one time or another, in that case the obligor has his election, and may perform one or the other, at either of the times, for the saving the penalty of his bond; and he said that no answer had been given to the rule laid down in *Sayer v. Glean*, that the law will supply the words "which shall first happen:" besides, that the rule laid down in 5 *Rep.* 22. a. is not as Mr. *Henley* has said, but the words of that book are, "and the reason and cause of the judgment was, that where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part;" but in the case at bar no part of the condition is become impossible by the act of God, but the marriage of *Frances* with the other defendant is her own act,

act, whereby the bond is forfeited; so he prayed judgment for the plaintiff.

Lee Chief Justice: I am clear of opinion that the defendant became liable to pay the 1200*l.* upon any of the contingencies (mentioned in the condition) happening; but yet am doubtful, upon taking the whole together, whether this disjunctive condition has not given an option to the defendant the obligor as to the time of payment; and it is certain, that generally speaking, conditions are to be construed liberally in favour of obligors, therefore am inclined to think that it was the intent of the parties that she should have her election to pay the money either at the time of her marriage with any other man, or at the death of her father, and the rather, because of interest to be paid at 5*l. per cent.*

Chapple Justice: It seems to me that the bond is forfeited and the money now payable, she having married another man, and this seems clear from the recital in the condition.

Dennison Justice: The terms of the condition are not very clear without taking into consideration the recital therein, whereby it appears that the intention of the parties was to marry after the death of *John Middleton* the father of the defendant *Frances*; I would not now be understood to give any conclusive or certain opinion but as at present advised; it seems to me that the intent of the parties was that in any of those cases which should first happen then the money should be paid: and this case does not fall within the rule, which puts it in the obligor's power to pay the money at what time he pleases; if a condition be, that if the obligor should go to *York*, or shall marry *A.* he shall pay 10*l.* a month afterward; it seems to me that if he do either he shall pay the money; and what is said by Chief Justice *Bridgman* in the case of *Sayer v. Glean*, 1 *Lew.* 54. weighs very strongly with me.

Wright Justice tacente. The court inclining to give judgment for the plaintiff, the parties agreed before another argument, *ut audiui.*

Sale versus Crompton per nomen Compton. B. R.

57 *Bald.* 1056

Amendment.
The defendant's name in a judgment upon a warrant of attorney not amendable.
Vide Cro. Car. 574.
2 *Stra.* 1209.
Sir S. C.

THIS was a judgment by *nil dicit* (upon a warrant of attorney) in 1732. the entry whereof upon record was mistaken, it bring *Compton* instead of *Crompton*. Now Sir *J. Strange* upon producing the warrant of attorney, and shewing the bill upon the file, were both against *Crompton*, and right; moved to have the record amended thereby.

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R

Sir S. C.

Sir *Thomas Bootle* against the amendment, said, that what was prayed, was rather that the court would make a new judgment against another person than an amendment, for that here the record was of a perfect judgment, and no way erroneous against *Compton*, and that to alter this judgment to *Crompton*, would be of the utmost ill consequence to purchasers. Sir *Danvers Osborne* since the entry of this judgment has purchased the lands of *Crompton*, and an affidavit has been read to the court on his behalf that he did not know of, or ever heard of this judgment and that he has paid the full purchase money for the land. He further insisted, that it was not in the power of the court to grant what was prayed at this distance of time, and that every amendment of a judgment generally ought to be made in the same term in which it is given; but supposing the court would do it, yet he insisted they could not now amend the dogget book, since the *stat. 4 & 5 W. 3.* and then it would be a judgment not doggetted, which would not affect a purchaser.

Sir *John Strange* in reply: That here was a warrant of attorney and the original bill to amend by at common law, and that therefore he had no need to pray in aid the statutes 14 *Ed. 3.* 8 *H. 6.* 9 *H. 5. c. 4.* which give power to the judges to amend the record at any time while the same remains before them; besides, he said that 100*l.* was deposited in the hands of one *Keeling*, Sir *Danvers's* steward, (as appeared by affidavit) to be applied to pay off this judgment, so that Sir *Danvers* could not be injured by making the amendment.

But the rule to shew cause was discharged by the whole court. *Lee Ch. Justice*, said, *Crompton* might have other estates, and for any thing that appears to us there may be other purchasers besides Sir *Danvers Osborne*, who may be affected if we should make the alteration prayed. *Chapple Justice* said: That it would be going further than ever was gone before; that as to the bill upon the file it was no bill in this cause; that this was a perfect judgment no ways defective, and that to alter the name to *Crompton* would be making a new judgment. *Wright* and *Dennison* justices were of the same opinion.

Power *versus* Shaw. B. R.

Prohibition to
the spiritual
court of Bris-
tol for calling
a woman
strumpet in the
city of Bristol

LIBEL in the spiritual court of *Bristol* for calling a woman *strumpet*; and the libel sets forth that the word *strumpet* meant that the party libelling was a prostitute, and had been guilty of fornication; and now upon a motion by Mr. *Poole* for a prohibition, the suggestion was that there is a custom in the city of *Bristol* to punish whores by imprisoning, carting and whipping, and that the calling

calling a woman a whore is actionable *there* by the custom of the place, and that if the words were spoken, they were spoken in the city of *Bristol*; and Mr. *Poole* said, that if the meaning of the word *strumpet* was uncertain in its meaning, yet the libel had reduced it to a certain signification, and it was there tantamount to *whore*; and cited *Hotchkis v. Corbet*, Hil. 9 Geo. 1. *Cases in Law and Equity* 114. 2 Ro. Abr. 295, 296. *Bennet v. King*, Mic. 7 Annæ. *Hart v. Holmes*, Mich. 8 Geo. 2. *N. B. Houblon v. Milner*, Lutw. 1039, or 1042. denied to be law by Lord *Harwicke* in the case of *Hart* and *Holmes*. Rule to shew cause.

Wilkes versus Broadbent. In Error. B. R,

1. T. R. 110

ACTION of trespass in the Common Pleas by *Broadbent* versus *Wilkes*, for breaking and entring the plaintiff's close at *A.* treading down the grass, subverting the plaintiff's soil, and for laying wood, slate, and other rubbish on the land, &c. per quod the plaintiff lost the use of his land.

2 Stra. 1224. 4. Num. R. v S. C. *Head 2 al*
A custom is void as being unreasonable, uncertain, and favouring too much of arbitrary power, and tending to make the Lord of a manor a judge in his own cause. 5 Q. B. 701

The defendant as to all the trespasss in the declaration, except the breaking and entring the close, treading down the grass, subverting the soil, and laying wood, slate and coals, &c. pleads Not guilty; and as to the rest of the trespasss (not covered by the Not guilty) justifies that the plaintiff ought not to have his action against him, because he says, that the said close, wherein the said trespasss is supposed to be done, lies in the manor of *Halton* in the parish of *Temple Newsham* in the county of *York*, and for time out of mind has been, and is demisable by copy of court roll, and that Lord *Irwin* is seised of the said manor whereof the said close is parcel, and that from time out of mind, there have been divers parcels of land in the said manor which at the time of the supposed trespasss were freehold, under which freehold land, there were coals; then sets forth the custom that the lord of the manor for the time being and his tenants of the collieries for time out of mind have used to sink pits within the freehold lands for working the same to get coals, and for all the time aforesaid have used to throw, place, &c. with shovels, spades, &c. earth, stones, coals, &c. coming out of the said collieries, together in heaps upon the land there near to such pits, such land being customary tenement and parcel of the manor, there to remain and continue, and to place, lay and continue wood there for the necessary use and making of the said pits, and to take and carry away from thence with waggons, carts, &c. part of the coals laid there, and to burn and make into cinders other part of the coals laid there during and at the will and pleasure of the said Lord or his tenants; then the plea sets forth the Lord *Irwin's* title, and the tenant's title, who justifies under him.

The

The plaintiff replies and traverses the custom, and thereupon issue is joined, which was tried at *York* by a special jury, and a verdict was given for the defendant for the custom.

Upon a motion in arrest of judgment in the Common Pleas the custom was there adjudged to be void, and that court gave judgment for the plaintiff upon the insufficiency of the bar, and awarded a writ of inquiry of damages, the defendant having in his plea acknowledged the trespass, and thereupon final judgment for damages and costs was entered for the plaintiff, and as to the other issue upon the Not guilty (as to the other part of the trespass) the entry was that the defendant *eat inde Sine die*.

Hereupon a writ of error was brought by the defendant below, and upon the general errors assigned this case was argued last term by *Tho. Bootle* for the plaintiff in error, and by Mr. serjeant *Prime* for the defendant, who began first although he was for the defendant in error; it was a second time argued this term by serjeant *Bootle* for the plaintiff in error, and by Mr. *Hume Campbell*, the King's counsel for the defendant; and lastly, it was argued by Sir *John Strange* for the plaintiff in error, and by serjeant *Belfield* for the defendant, in *Michaelmas* term 18 Geo. 2,

Two points were made; 1. Whether this was a good and reasonable custom, or *lex loci*; and 2. Whether the entry of the judgment be made rightly; for if the custom be good, or the entry be not legally or rightly made, in either case the judgment is reversible.

Judgment of
the court.

In *Easter* term 18 Geo. 2. *Lee* Chief Justice delivered the opinion of the whole court of King's Bench, that this custom was unreasonable and void, and consequently the verdict found for the custom, could not hinder the Common Pleas from giving judgment for the plaintiff there, the defendant *there* by this plea having confessed the trespass, for it is not to be doubted but the finding of the jury is void, if the custom be bad in point of law. The Chief Justice said, the custom was void for these reasons; 1st, Because it is very uncertain, for the word *near* is of great latitude, and too loose to support a custom, such as this is pleaded to be; 2^{dly}, Because it was very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and favors much of arbitrary power, being pleaded to be at the will and pleasure of the Lord, and to it do as often, and when he pleases; and if a custom be unreasonable no length of time can make it good; *quia in consuetudinibus non diuturnitas temporis sed soliditas rationis est consideranda*. *Co. Lit.* 141. a. and what was said at the bar touching the public

public utility of coal-pits to the realm cannot be considered, for the pits may be worked without this custom, for aught that appears to the contrary; the case in 1 *Roll. Abr.* 560. *pl.* 1. differs from the case at bar, so does 3 *Lev.* 160 and 1 *Lev.* 231. As to what was said at the bar that this being a question between the lord and his copyholders, the custom might have a reasonable commencement, and that the lord might grant his lands to the copyholders charged as he thought fit, and that a copyholder, in the eye of the law, was but a mere tenant at the will of his lord: I answer that he has more than an estate at will, for he has an inheritance *ad voluntatem domini secundum consuetudinem manerii; et consuetudo est altera lex*, 4 *Rep.* 21. And to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom and contrary to law, that the lessor shall have common *encounter son demise quia est parte del chose demise*, *Palm.* 212. and this custom being pleaded to be at the will and pleasure of the lord, tends to make him judge in his own cause, which the law will not endure. *Lit. sec.* 212.

As to the objections which have been taken to the entry of the judgment, we are all of opinion, that it is very rightly entred, it appears by the defendant's plea, that he has confessed the cause of action; if therefore the custom be void, as it certainly is, the jury's finding for the custom cannot hinder the court from giving judgment. *Cartb.* 372. or 307. 27 *Ed.* 4. *Bar. fo.* 462. *2 Rol. Abr.* 99. The judgment is rightly given upon the defendant's plea, and not upon the verdict; *nullo respectu habito veredicto*. The setting aside the verdict would have been wrong: this is not like the case in *Cartbew*, this is such a verdict as does not stop the court from awarding a writ of inquiry of damages. Second Point.

The judgment of the Common Pleas was affirmed by the whole court. *Vide Davis* 39. *b.* 4 *Rep.* 21. 2 *Ric.* 2. 3. 21 *Ed.* 4. 8. *b.* *Lit. Rep.* 233. *Hutt.* 101. *Het.* 126. *Co. Lit.* 59. 1 *Leo.* 11. 2 *Roll. Abr.* 266.

John Martin, on the demise of Thomas Tregonwell, Esq; Plaintiff in Error, *versus* John Strachan the younger, Esq; and Luke Harrison Defendants.

3 Adoll. 2. 897

Ejectment of lands in Milton in the county of Dorset.

Ante. 2.

note 5 T. R. 1074
a full note of
opinion of the Court
in this case
20. Welles Rep. 444

2. Str. 1179

JACOB Bancks, Esq; upon the 27th day of February 1737. died intestate, and without issue, seised of the manor of *Milton Abbas* in *Dorsetshire*, and of divers other lands and tenements in the same county, of the yearly value of 3000 *l.* which were the ancient inheritance of the family of *Tregonwell*, of which family the said *Jacob Bancks* was, by *Mary* his mother, who was a *Tregonwell*.

The defendant *Strachan* (though he was born in *England*) was of *Swedish* parents; and the defendant *Harrison*, as his agent and servant, having upon the decease of the said *Jacob Bancks* got into the possession of his estate, *Thomas Tregonwell*, who claims as heir at law to the said *Jacob Bancks* on the part of the mother, *viz.* by the said *Mary*, who was a *Tregonwell*, brought this ejectment to try his title to the said manor and lands, to which the defendants pleaded the general issue *Not guilty*.

This cause was tried at bar in the court of King's Bench in *Michaelmas* term 1738. when the jury found a special verdict, which is very long, by reason that several deeds and settlements are found thereby, and set forth therein *verbatim*, but the substance thereof is to the effect following, *viz.*

That the lands in question were the inheritance of *John Tregonwell*, Esq; the great grandfather of the lessor of the plaintiff *Thomas Tregonwell*.

That this *John Tregonwell* died seised thereof in the year 1639. leaving issue two sons *John* and *Thomas*.

That *John* the son had issue *John* the grandson; and that the lands upon the decease of *John* the son descended to *John* the grandson; who having issue only two daughters *Mary* and *Catharine*, he, in the year 1680. by a settlement dated the 3d day of *June* in that year, made upon the marriage of *Mary* his eldest daughter with *Francis Lutterel*, Esq. settles great part of his estate (after some limitations in part to the use of himself and *Jane* his wife as a provision for themselves for life) to the use of the said *Francis Lutterel* for life, remainder to the said *Mary* for life, remainder to her first and

and other sons of that marriage in tail male, remainder to her first and other sons by any second or other husband in tail male, remainder to his second daughter *Catharine* for life, with like remainders to her first and other sons in tail male, remainder to the daughters of *Mary* in tail, remainder to the daughters of *Catharine* in tail, and in default of such issue, *limits the reversion in fee to his own right heirs.*

The other part of his estate he limits by the same settlement to his daughter *Catharine* for life, with remainder to her first and other sons in tail, remainder to his eldest daughter *Mary* for life, remainder to her first and every other sons in tail male, with the like remainders for the daughters of *Catharine*, and afterwards of *Mary* in tail; and for default of such issue, *limits likewise the reversion in fee of this other part of his estate to his own right heirs.*

The jury find that *John Tregonwell*, the father of *Mary* and *Catharine*, died the 29th day of *January* 1680. and that *Catharine* his second daughter died the 11th day of *August* 1683. under age and unmarried, and that thereupon *Francis Lutterel* and *Mary* his wife, in right of *Mary*, entred into that part of the lands also, which was limited to the use of *Catharine* and her issue, as well as that they had before entred into, and were seised of the other part of the lands which was limited to *Mary* and her issue; and that upon the decease of *Catharine*, the reversion in fee of the whole estate (of which, during the life of *Catharine*, *Mary* was but a coheir with *Catharine*) descended to *Mary* as right heir of her father.

They find that the said *Francis Lutterel* died leaving only two daughters, and that the said *Mary* his widow, after his decease, married with Sir *Jacob Bancks* a *Swede* by birth, by whom she had issue only two sons, both born in *England*, to wit, *John* and *Jacob*, and that *John* the eldest survived his mother, and died without issue in 1725. and that thereupon the said *Jacob Bancks* the second son entred and was seised as tenant in tail with the reversion in fee in himself, which reversion in fee descended from *John Tregonwell* the father of *Mary*, to *Mary*, and from her to her eldest son *John*, and from him to her second son *Jacob*, so that this reversion was in *Jacob* by descent *ex parte maternâ*.

Tenant in tail
by purchase
secundum
formam doni
with the re-
version in fee
in him, both
ex parte ma-
ternâ,

They find that *Jacob Bancks* being so seised, did in *Michaelmas* term 1725. suffer a common recovery in the usual form, having by a deed of bargain and sale inrolled made a tenant to the *præcipe*, and by the same deed declared that such recovery should be and enure to the use of himself and his heirs, and died without issue.

suffers a reco-
very to the
use of his own
right heirs.

The lessor of
the plaintiff's
pedigree.

They then find the pedigree of *Thomas Tregonwell* the lessor of the plaintiff in error, to wit, that he is the great grandson and heir of *Thomas Tregonwell*, who was, as before mentioned, the second son of the first named *John Tregonwell*, which *John* died in the year 1639. leaving issue as before mentioned *John* his eldest son (who was the grandfather of the said *Mary* the mother of *Jacob*) and also the said *Thomas* the plaintiff's great grandfather; so that the lessor of the plaintiff is undoubtedly heir to the said *Jacob Bancks* on the part of the mother, and intitled to his estate as such, in case the lands are descensible to his heir on the part of the mother.

The defendant's
pedigree.

The jury next find the pedigree of the defendant *Strachan*; viz. That *Lawrence-Bengston Bancks* an alien and *Swede*, had issue by *Christina* his wife an alien, one son, the before named *Sir Jacob Bancks*, and three daughters named *Brita*, *Ingri*, and *Anna-Christina*, all aliens born in *Sweden*; and that *Brita* the eldest daughter married one *Peter Bobmgreen*, an alien and *Swede*, and had issue by her said husband four daughters, namely, *Maria-Christina*, *Brita*, *Christina*, and *Margaretta*, all aliens and *Swedes*, and died leaving no other issue: and that the said *Ingri* was married, and had issue, whose names are known to the jury, and are all aliens and *Swedes*, and died leaving such issue who are now living in *Sweden*; and that the said *Anna-Christina* is dead without issue; and that the said *Maria-Christina* and the said *Brita*, daughters of the said *Brita* by the said *Peter Bobmgreen*, are living: and that the said *Christina*, daughter of the said *Brita* by the said *Peter Bobmgreen*, was married and had issue whose names are unknown, and who are all aliens and *Swedes*, and is since dead, leaving such issue who are now alive.

They find that *Margaretta*, the fourth daughter of the said *Peter* and *Brita Bobmgreen*, was married in the county of *Middlesex* to one *John Strachan* an alien and *Swede*, and had issue by her said husband one son, namely, *John Strachan*, Esq; the defendant, who was born on the 17th day of *March* 1707. at the city of *London* within the Kingdom of *Great Britain*: and that the said *Margaretta*, mother of the said *Mr. Strachan*, died in *February* 1726. leaving the said *Mr. Strachan* her only son.

They find that the said *Lawrence Bengston Bancks* and the said *Christina* his wife, and the said *Sir Jacob Bancks* their son, and the said *Brita*, *Ingri*, and *Anna-Christina* their daughters, and the said *Peter Bobmgreen*, and the said *Christina* and *Margaretta* (mother of the said defendant *John Strachan*) were all aliens and *Swedes*, and so continued to the time of their respective deaths: and that the said *Maria-Christina* and the said *Brita*, the daughters of the said *Peter* and *Brita Bobmgreen*, and all the issue of the said *Ingri*, sister of the said *Sir Jacob Bancks*, and all the issue of the said *Christina* (daughter of the said *Peter* and *Brita Bobmgreen*) are aliens.

The

The jury having thus found the facts, conclude to the judgment of the court, whether upon the whole, the entry of the plaintiff into these lands was lawful or not; and if the court are of opinion that it was lawful, then they find for the plaintiff; but if the court are not of that opinion, then they find for the defendants, upon this special verdict.

The general question was, whether the lessor of the plaintiff, who claims as heir *ex parte maternâ*, is intitled.

It was argued for the plaintiff that he was well intitled to recover; 1st, Because the rule of law is clear that an estate of one dying seised by descent *ex parte maternâ*, can descend to none but the heir *ex parte maternâ*: this is founded on natural justice, that an estate should go to the family and blood from whence it came, where the owner has not himself thought fit to give it from them.

2^{dly}, Because this estate was originally the inheritance of the mother of *Jacob Bancks* and her ancestors, and therefore if there has been no interruption of the course of descent, it must now descend to *Mr. Tregonwell*; the only interruptions insisted on, are the settlement in 1680. and the recovery and deed of uses in 1725.

As to the former, they insisted, it was only a temporary interruption of the possession by the particular estates carved out of the fee, but the inheritance was still left to descend *ex parte maternâ*; and whenever those particular estates should determine, whether by deaths of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again.

And as to the recovery and deed of uses (they said) they only determined and barred the particular estates, and consequently let the reversion in fee into possession in the same condition and quality as when in reversion, and therefore (they argued,) could not alter the nature of the ancient use, or descendible quality of it.

And they said that this is clearly the case of a fine levied by tenant in tail, who has the reversion in fee in himself, it having been settled that such a fine extinguishes the estate-tail, and lets the old reversion into possession; nor is there any material difference between a fine and recovery, they are both universally held to be bars (so far as their respective powers reach) of the particular estates, and conveyances of their own inheritances in fee.

For the defendants it was argued, that the lessor of the plaintiff as heir *ex parte maternâ* had no title; for that *Jacob Bancks*, tenant

PART I.

T

in

in tail by purchase *secundum formam doni*, by the common recovery to the use of himself in fee, acquired a new fee descendible to his own right heirs general, and that the title under the settlement was thereby destroyed; they said it was true indeed that if one so seised had made a feoffment to the use of his own right heirs, it would have worked no alteration but been the same use, according to *Co. Lit.* 13. 3 *Lev.* 406. *Salk.* 590. but that is only in case of a descent, whereas the estate *Jacob Bancks* took under the settlement was as a purchaser *secundum formam doni*.

It was objected for the defendants, that there is a very material difference between a recovery and a fine; 1st, That a recovery not only bars the estate-tail, but all the remainders after it.

Poph. 5.

2^{dly}, That a recovery is the proper conveyance of a tenant in tail with remainders over, and therefore operates as a grant from the tenant in tail, and that the recoveror has a fee, and comes in under tenant in tail in the *per* as his grantee, and therefore as a purchaser.

3^{dly}, That the estate is continued and enlarged by the common recovery.

In answer to the first objection it was said by the plaintiff's counsel, that the distinction between a recovery and a fine is immaterial, because the distinction affects only the extent of the bar or extinguishment, but not the manner of the operation of those instruments; it proves the recovery to be a bar or extinguishment of the estates-tail both in possession and remainder, but doth not prove it is less a bar or extinguishment of either; and the bar or extinguishment of both by the recovery, as much lets in the reversion in fee after both as the bar or extinguishment by fine of *one* lets in the reversion in fee dependant on that *one* only.

Nor can the above distinction be applicable to the case of a recovery by tenant in tail with an immediate reversion in fee in himself, and it seems extremely difficult to maintain that in such a case a fine would operate to the old use and go *ex parte maternâ*, but that in the case of a recovery it operates to a new use only, because a recovery will bar or destroy an intermediate remainder in tail; and they contended for the defendant, that whether *Jacob Bancks*, in the present case, had levied a fine or suffered a recovery to the use of himself in fee, they ought either of them to have had the very same operation of the other, and the very same effect to let in the old reversion to descend *ex parte maternâ*.

It

It was said by the plaintiff's counsel in answer to the second objection, that it would be to make the recovery operate not as a bar to the particular estates-tail in possession and remainder, (which is the sense and language of all the books (but as a bar to *Jacob Bancks's* own reversion in fee, which is absurd; nor indeed is a recovery in any other sense a grant from the tenant in tail, than as it is a common assurance by which he may bar those particular estates, and acquire and convey the fee-simple in possession; but it is no less such an acquisition, if he gets it by barring the intermediate particular estates and letting in his own fee into possession, than if it could be said to be a grant of the estate-tail itself to himself in fee: but whatever might be the case where the estate-tail in possession, together with the remainder and reversion is in others; yet where the tenant in tail in possession has also the reversion in fee (they insisted) the recovery operates as a conveyance of the reversion, and as a bar of the intermediate estates.

That at most a recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate-tail alone; nor can the recoveror in a recovery come *in* more under the tenant in tail, or his estate-tail, or be more properly a grantee from him of the estate-tail, than the conufee in a fine is under the conufor; and yet that notion clearly doth not prevent the estate-tail from merging in the fee in this latter case.

As to the 3d objection, that the estate-tail is continued and enlarged by the recovery, the plaintiff's counsel said, that this, at best, is but a very inaccurate manner of speaking, if not unintelligible and absurd, since an estate-tail cannot continue longer than the issue *per formam doni*; and a fee-simple cannot with any propriety be called an enlarged estate tail. The only reasonable sense of such expressions is, that the tenant in tail has, by exercising the power, given him by the law, of barring the estates-tail, become possessed of the absolute fee in possession: but in this sense it makes out the plaintiff's case, not the defendant's; nor is this any other sort of enlargement of his estate, than a surrender of a tenant for life to the remainder-man in fee is an enlargement of the remainder-man's estate; and is more properly, therefore, an enlargement of the fee-simple, by sinking the particular estate, than an enlargement of the particular estate, which is absolutely destroyed,

Nor doth this manner of considering the recovery in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate, because he acquires as much this way, as the other, with this advantageous circumstance, that it keeps the estate in it's natural channel, and prevents this act, done for one purpose only,

only, from enuring to another which he never thought of, and which, if he had, he might and probably would have avoided; and for these reasons the council for the lessor of the plaintiff prayed that the judgment given by the court of King's Bench might be reversed.

After time taken to consider, judgment for the plaintiff.

Tenant in tail by purchase per formam doni ex parte maternâ, with reversion in fee in him by descent ex parte maternâ suffers a common recovery to the use of himself in fee, the lands shall descend to his heirs general, and not to the heirs ex parte maternâ.

Curia: This is an ejectment of lands in *Milton* in the county of *Dorset* upon the demise of the heir of *Jacob Bancks* on the part of his mother; upon Not guilty the jury have found a special verdict, whereupon the short state of the case is, That *Jacob Bancks* tenant in tail by purchase *secundum formam doni* (under a marriage settlement made in 1680. by an ancestor) *ex parte maternâ*, with reversion in fee to himself by descent *ex parte maternâ*, suffers a common recovery to the use of himself in fee; and whether this fee shall descend to the heir of *Jacob Bancks* *ex parte paternâ*, or *ex parte maternâ*, is the question; and if it shall not descend to his heir on the part of his mother, there is no title found for the lessor of the plaintiff, and the possession of the defendant is sufficient to intitle them to judgment.

We are all of opinion that judgment ought to be for defendants, because *Jacob Bancks* took by purchase under the settlement, and not by the descent.

Purchase, what it means

* A lord who takes by estate can hardly be said to take as a purchaser or by descent.

The word *purchase* in common sense means no more than when a man gives money for any thing; but in a legal sense every man is a purchaser of an estate who does not take it by descent*; and whenever a man gains a new estate he is said to take it by purchase; so a man may take as heir of another and yet be a purchaser; as if lands be granted to *A.* remainder to the right heirs of *B.* the heir of *B.* takes by purchase and not by descent, because *B.* had nothing in him, for nothing can descend to a man from a father who had no estate in him.

Jacob Bancks having the estate-tail in him by purchase, and the reversion in him by descent, both on the part of the mother, is what makes the dispute in this case.

Before the statute *de donis conditionalibus*, a man seised to himself and the heirs of his body had a fee conditional, and as soon as he had issue the condition was taken to be performed, and he then had an absolute fee, which he could sell, and thereby disinherit his issue; to prevent which, the statute *de donis* was made; and for a long time

time was thought to be a good law, but in time great inconveniences ensued from it; the power of the barons was thereby greatly increased, it hindered the King of his forfeitures, younger children could not be provided for, nor money raised under the greatest necessities or misfortunes of tenants in tail; it was in vain to endeavour to get the house of lords to repeal this statute for the reason above, and therefore mankind looked out for some other method of avoiding the evils it had introduced; and about 200 years afterwards in the time of *Edward* the 4th, (who was a wise prince, though he had some human failings) the judges, who in all ages have set their faces against perpetuities, introduced common recoveries to bar the issue and remainders in tail (which have now been in use near 300 years) under a notion or pretence that a common recovery was implicitly excepted out of the statute *de donis*, and that the issue in tail was intitled to a recompence in value; but this is a strange construction, and seems to me to destroy the very intent of this statute; and whenever reasons have been attempted to be given for common recoveries being bars, or excepted out of the statute *de donis*, strange absurdities appear; every body allows the remainder-men are barred thereby as well as the issue in tail, and yet the recompence over in value does not extend to remainder-men; besides the recovery over in value is against an officer of the court, who is the common vouchee, and this part of the process is a mere fiction; whoever therefore attempts to put these feigned recoveries upon the same foot with true and real recoveries upon title, will run into absurdities.

Why and when common recoveries were first introduced.

Whoever endeavours to explain common recoveries upon any other principles than that they are now become common assurances, will run into absurdities.

To say they were excepted out of the statute *de donis*, destroys at the same time the very intent thereof. And as to the recompence over in value to the issue it is a mere fiction; and no body pretends it extends to a remainder-man, who is equally barred by a recovery.

We think common recoveries are common assurances with the consent of the parties, and are not to be compared to a judgment or proceeding in any other real action; 1st, Because now by long custom and usage they are become common assurances; 2^{dly}, Because they are suffered by consent of the parties; and a remainder can be barred upon no other principle than this, that a common recovery is a common assurance. 5 *Rep.* 40. *a. b.* *Piggott*, who was as able a conveyancer as any man of the profession, has confounded himself and every body else that reads his book, by endeavouring to give reasons for, and explain common recoveries. *Piggott* 18, 19, 20, 21. I only say this to shew that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense. They have been in use some hundreds of years have gained ground by time, and we must take them as they really are, common assurances. * I only deliver this as my own notion of recoveries, leaving others to their own judgment and opinion.

* Lord Ch. Justice Willes.

Piggott 21.

Now if what *Piggott* says be true that the recoveror comes in, in continuance of the estate-tail, and that the recovery enlarges the estate-tail, which by supposition of law has perpetual continuance, then *Jacob Bancks's* reversionary interest could never come into possession; but whether the recovery discontinued, barred, annihilated, or conveyed the estate-tail, I think it is the same thing.

Our opinion is, that *Jacob Bancks* by the common recovery conveyed a fee to the recoveror, and as there cannot be two fees, the reversion in fee comes too late, so that it was not the reversion that he conveyed; and we are of opinion that the uses arise out of the estate-tail which *Jacob Bancks* had by purchase originally *per formam doni*, and not out of the reversion; and that after his death the lands in question descended to his heirs general, and not to the heirs *ex parte maternâ*, because he took the estate-tail by purchase. Judgment for the defendant.

N. If *Jacob Bancks* had been tenant in tail by *descent ex parte maternâ*, and suffered a recovery to the use of himself in fee; *Quære*, if the lands would not have descended to his heir *ex parte maternâ*? *Abbot versus Burton*, *Salk.* 390.

Rex versus The Inhabitants of Luffington. B. R.

Order of sessions must adjudge, and not state the evidence only.

AN order of two justices to remove *Elinor* the wife of *William Hellier* from the parish of *Simonsbury* to *Luffington*, as the place of her husband's last legal settlement, was confirmed by the sessions; and now upon removing the order of sessions, it is thus stated specially, *viz.* Upon hearing the appeal made by the parish of *Luffington* to an order for removing the said *Elinor* from the parish of *Simonsbury* to *Luffington* as the place of her husband's last legal settlement, it appearing to this court, and this court doth adjudge it to be true, that *William Hellier* about 18 years ago was married to *Mary Hanbury* by a person in a black gown and a band, whom they took for a clergyman, but since have been informed was a layman; that the church matrimonial service and the ring were used in the ceremony, that it was in a private house, that they lived together nine or ten years; that on the 10th of *June* 1742. the said *William Hellier* was married to the said *Elinor* at *S.* by a clerk in holy orders, and that this marriage was (in the life of the said *Mary*) by licence, whereupon the sessions confirmed the order of two justices. But *per totam curiam*, the order of sessions was quashed, because it does not adjudge that the first marriage was really a marriage or not, but only states evidence of a marriage; and they said they would not give any judgment whether the first marriage

marriage was good or not, but that the sessions ought to have determined that matter, and if they had judged wrong, this court would have set them right.

Trinity Term

17 & 18 Geo. 2. 1744.

Anonymous. B. R.

IN action of covenant upon a lease the breach assigned was for non-payment of rent, and not repairing the premises; it was now moved that upon payment of what shall appear due for rent, proceedings as to *that* shall stay. *Per curiam*, this has often been done, so let it be referred to the master.

Covenant for non-payment of rent, and not repairing, referred to the master as to rent, and on payment thereof process to stay as to that.

5/13/6709

Rex *versus* Carroll, Esq; a Barrister. B. R.

AN information for a misdemeanor was granted last term against the defendant upon the affidavit of *Murphy*; and in the vacation before this term *Carroll* indicted *Murphy* (the prosecutor of the information) for perjury in his affidavit; and now it was moved for an attachment against *Carroll* for a contempt in endeavouring to evade the justice of this court; but *per curiam*, as this Mr. *Carroll* has found credit with the grand jury, it would be too much for us to grant an attachment against him; but they said this was a practice that but too often happened, and wished there could be some method found out to put a stop to it; and that in the case of *The King versus Rhodes*, the defendant was indicted for forging a will while the validity thereof was under a proper examination before a court of Delegates; and when the indictment came on to be tried before Lord *Raymond*, he refused to try it; and the court in the present case granted a rule for an attachment against one *Redman* for threatening *Murphy* the prosecutor with danger of his life, and saying that he would be hanged.

Attachment against one for threatening a prosecutor with danger of being hanged, but refused against the defendant, who indicted the prosecutor for perjury in his affidavit, on which the information was granted.

Lew

Low *versus* Newland. B. R.

Amendment
of replication
from *de in-
juria sua pro-
pria* to *mol-
liter manus
imposuit*.

ASSAULT and battery; defendant pleaded *son assault demesne*; plaintiff replied *de injuria sua propria*; and now moved to amend his replication by replying *molliter manus imposuit*; the pleadings being all in paper and not entred on record, the court granted the motion, saying there could be no inconvenience.

Rex *versus* The Vicar and Churchwardens of From
Selwood. B. R.

You cannot
move for your
argument for
a matter of
course in the
paper in B. R.

NOTA, This was a cause in the paper, but only a word of course which was opened, and judgment prayed therein by Sir *John Strange*, King's counsel, who had precedence next to the attorney general; after which *Chapple* Justice (*absente* Lee Ch. Justice) called to Sir *John* to move, which he accordingly did, and immediately after called to him to make a second motion, telling him that the first motion he had made was for his argument; but the gentlemen at the bar objected to this, so Sir *John* did not move for his argument: but the court said it was the rule and practice in the Common Pleas to move for your argument for every cause in the paper of course; and so it certainly is; but it is not so in *Banco Regis*.

Rex *versus* The Mayor of Wigan. B. R.

2 Bac 764

Mandamus to
the mayor of
Wigan to
give the key
of the town-
hall to the
lord of the
manor to hold
his leet there
refused, tho'
the same had
been usually
held there.

DOCTOR *Bridgman* rector of *Wigan*, as lord of the manor claimed to hold a court-leet, at which the in-burgessees of *Wigan* are obliged to attend to make a jury which they have neglected and refused to do at two courts, by reason whereof no business could be done; and therefore the court last term, upon the rector's application, granted a *mandamus* to oblige them to attend; this court leet having been usually holden in the town-hall of *Wigan*, which belongs to the corporation, the mayor refused to permit the rector to have the use of the town-hall; and therefore it was now moved by Sir *Thomas Bootle* and Mr. *Starkie* for a *mandamus* to the mayor to oblige him to deliver the key of the hall to Doctor *Bridgman*, to hold the court-leet there, and insisted that the former *mandamus* for the burgessees to attend the leet would be of no use, if they could not have the use of the town-hall.

Chapple Justice: I can see no objection why we should not grant a rule to shew cause

Dennison Justice: I never knew such a *mandamus* as this granted; the lord of the manor may hold the leet in what place he pleases in the manor, and the burgesses are bound to attend; the reason suggested to us for granting this *mandamus* is, that if the lord should hold his leet in any other place than where it has usually been holden, the in-burgesses are not bound, or will not attend it; but this reason doth not appear satisfactory to me, and there is no precedent of a *mandamus* of this kind.

Chapple Justice: If the in-burgesses have attended this leet at the town-hall time out of mind, as is alledged, that custom is a *right*.

But the rule for a *mandamus* was denied by *Wright* and *Dennison* Justices, *contra Chapple*, (*absente Capital Justic*) there never having been a precedent of such a rule.

In an ejectment on the demise of the Mayor, Aldermen and Commonalty of Bristol, *versus*——B. R.

MR. *Henley* moved to change the *venue* from *Bristol* to the next adjacent county. *Cur*, Take a rule to try it the next county, the way is not to change the *venue*, but to try it in the next county. Rule to try a cause in the next county.

Rex versus Roberts. B. R.

UPON the traverse of an inquisition sent out of Chancery to be tried in *B. R.* the *venire facias* must be made returnable upon a general return, and not upon a day certain. Ve. fa. on a traverse of an inquisition must be returnable at a general return.

Drew versus Marriot. B. R.

THIS was a rule to shew cause why the process served upon the defendant should not be discharged, the same being sued in *Middlesex*, and the defendant being served with it in *London*: upon shewing cause an affidavit of the plaintiff was read, wherein he swore that the defendant promised him to appear to any writ he should sue out, and it being a doubt whether the place where the defendant was served was within the county of *Middlesex* or the city, the court thought it a good service, and discharged the rule. Service of process and it is doubtful whether the place where defendant was served is in London or Middlesex.

Symonds *versus* Parmenter and Barrow. B. R.

Amendment
of the title of
a declaration
according to
the truth of
the fact as to
the time of
the delivery
thereof.

~~S. J. R. 134~~

acc.

~~9.4 the reference
is correct~~

1. East 134

acc.

IN an *assumpsit* by original returnable in *Trinity* term 16 & 17 Geo. 2. *Barrow* being abroad the plaintiff was obliged to proceed to the outlawry against him, (this being a joint action) before he could go on against *Parmenter*; he accordingly did outlaw *Barrow*, and afterwards on the 11th day of *February* in the last *Hilary* term delivered a declaration to *Garnett* the defendant's attorney, intituled of *Trinity* term in the 16 & 17 Geo. 2. when the writ was returnable, in which declaration the record of the outlawry against *Barrow* was set forth, (as was necessary) which outlawry was pronounced and recorded long after *Trin.* 16 & 17 Geo. so that the title of the declaration was absurd; therefore it was now moved by Mr. *Bancks*, on behalf of the plaintiff, for leave to alter the title of the declaration according to the truth of the fact as to the time of the delivery thereof, which was on the 11th of *February* last, and to make it a declaration of the octave of the Purification the blessed virgin *Mary* in that term, which was after the outlawry: Sir *John Strange* for the defendant objected that a proper foundation to amend by had not been laid before the court, as might be done by filing a bill of *Hilary* term to warrant it by, and as was done in *Russell versus Martin*, *Pas.* 10 Geo. 1. But *per curiam*, the affidavit of the fact that the declaration was delivered the 11th of *February* last, is a sufficient ground for us to make the title of it agreeable to the truth, and there is a difference between mending a declaration in the body of it, and in altering the title of it, and the rule for mending the title was made absolute.

Malachi Carolino's Case. B. R.

1744 C 584

Ambassador.
Protection.

HE was interpreter to the ambassador to the court of *Great Britain* from the *Bey* of *Tripoli*, and being arrested upon the process of this court for a debt, a rule was made for the parties concerned in the suit against him to shew cause why he should not be discharged out of custody upon the *stat.* 7 *Annæ*, which rule was founded upon *Carolino's* own affidavit; wherein he swore that in *May* 1744. he was retained by the ambassador to be his interpreter, and to transact his business in the cities of *London* and *Westminster* for the wages of 30 *l.* *per annum*, and that he was not a trader, or liable to a commission of bankruptcy; and upon several other affidavits made by other persons that he was not a trader, and upon the certificate of the ambassador himself that he was his interpreter.

Mr.

Mr. Lloyd and Mr. Hume Campbell, in shewing cause insisted he was not such a servant as is within the meaning of the *stat. of Q. Ann. viz.* a domestic servant; and notwithstanding Mr. Attorney General and Sir John Strange *totis viribus* pressed to have the rule made absolute, yet the court was clear of opinion that there was not sufficient matter laid before them to make the rule absolute, for it does not appear that *Carolino* is a domestic servant; and *Wright* Justice with some warmth said, it did not appear he had done any one act as a domestic servant, and that it was formerly thought necessary that a foreign ambassador's servant must lie in the house to intitle him to a protection under the statute; so the rule was discharged. *Vide Evans v. Higgs, Paschæ 1 Geo. 2. B. R. Toms and Hammond C. B. 7 Geo. 2. Ward and Purcell, Mich. 2 Geo. 2. Moor* secretary to the *Russian* ambassador's case. *Ward and Percy. Ball and Fitzgerald. Ld. Raym. 1524.*

N. Lee Ch. Justice was confined at home by the gout from the first *Tuesday* in term, till the end of it.

Michaelmas Term

18 Geo. 2. 1744.

Howell qui tam *versus* Morris. B. R.

THIS was an action upon the *stat. 18 Eliz. cap. 15.* against the defendant for making and selling gold rings of less fineness than the statute directs, whereby the value of the rings so sold were forfeited, one half to the King, and the other to the party grieved; and now Mr. Harvey moved for leave to compound, and cited a case of *Bell qui tam v. Wyatt, Trin. 1733.* where there was no consent, and yet the court in that case gave leave to compound. *Per curiam,* It is in the discretion of the court to give leave to compound, and they desired Mr. Harvey to look a little further into the case he had cited, and afterwards the court denied to give leave to compound.

Leave to compound denied upon the statute for selling gold rings of less fineness than the statute directs.

Coates *versus* Hewit. B. R.

Debt upon a bond with condition to pay money at three times, the bond is in force by making any one default.

THIS was an action of debt upon a bond with condition for the payment of 5*l.* on the 1st of *August* 1742. and 5*l.* more on the 1st of *August* 1743. and 5*l.* more on the 1st of *August* 1744. The action was commenced and the bill filed in *Easter* term last, which was before the day of the last installment; the defendant set forth the condition, and demurred; and upon arguing this case by Serjeant *Bootle* for the defendant, and serjeant *Draper* for the plaintiff, the single question was, whether this bond was forfeited, and the action could well be brought before the day of the last installment was passed; and *per tot' curiam*, the bond became absolute by not performing the first, or any one of the payments in the condition, notwithstanding that the condition doth not say, "that in default of payment at any of the said times the bond shall be in force;" and they said there was a difference between debt on such a deed as this, and an action on a contract for paying several sums at several times. See *Co. Lit.* 222. *b.* *Mo.* 65. 10 *Rep.* 128. *Co. Lit.* 292. *Owen* 42. Judgment for the plaintiff.

N. The same point exactly was determined between *Hallet* and *Hodges* afterwards in *Easter* term 25 *Geo.* 2. wherein there was judgment for the plaintiff. B. R.

Skinner *versus* Stacy. B. R.

Principal and interest, &c. upon a mortgage referred to the master on stat. 4 & 5 Ann.

THE defendant being a prisoner, moved that upon paying the principal, interest and costs, to be computed and taxed by the Master, all proceedings in this action upon a bond for performance of covenants in a deed of mortgage; and in an ejectment brought upon the same mortgage might be stayed upon the *St.* 4 & 5 *Anna*, and that the defendant might be discharged out of custody: Mr. *Ford* for the plaintiff objected, that the defendant had agreed to convey to the plaintiff the equity of redemption; but it appearing upon an affidavit read that the plaintiff had not tendred to the defendant a deed of conveyance to be executed, and that no bill in equity was brought, the court granted the motion, after time taken to consider thereof.

Benjamin

Benjamin *versus* Howell. B. R.

TRESPASS, laid at *Hereford* in the county of *Hereford*, for taking the plaintiff's cattle, and driving them away, and converting them to his use; defendant pleads Not guilty as to the conversion; and as to the taking and driving them away, justifies as bailiff of the manor of *A.* that such proceedings were had in the court of the manor, that a *distingas* issued directed to the defendant, who by virtue thereof distrained the plaintiff's said cattle to enforce his appearance at the manor court, and concludes *quæ est eandem transgressio*, without traversing the place laid in the declaration; and after two arguments by *Ford* and *Evans* for the plaintiff, and *Poole* and serejant *Bootle* for the defendant, upon a special demurrer the court gave judgment for the plaintiff, that the plea without a traverse was not an answer to the trespass at *Hereford*; and *Lee* Chief Justice cited *Cro. El.* 705. which says a traverse is necessary, and thought the plea bad in substance; *Wright* Justice was of the same opinion; but *Dennison* Justice, doubted whether it was bad in substance, but was clear it was bad in form; and *that* being shewn for cause, judgment must be for the plaintiff, which was given accordingly.

Traverse is necessary where defendant justifies at another place than is laid in the declaration. Cited for the plaintiff *Cro. El.* 504. *Co. Lit.* 288. 2 *Lut* 1407. 3 *Lev.* 113, 227. *Carth.* 323. 2 *Mod.* 86. For the defendant *T. Jones* 146. *Cro. Car.* 228. *Salk.* 641. *Lut* 1862. 1 *R. Rep.* 221. 327. *Curtis v. Adams.* Vide 1 *Str.* 694. cited by *J. Dennison.*

Between the Parishes of Fittleworth and Pulborough in Suffex. B. R.

WILLIAM Overington with his wife and three children came with a certificate from *Pulborough* to *Fittleworth*, and after continuing in the parish of *F.* some time. *William O.* at a court-leet held for the bishop of *Winchester* for the manor of *Amberley* (within which part of the said parish of *F.* lies) was elected and sworn tithingman for *Cold Waltham*; that after having continued in that office five months, he became chargeable to, and received relief of the said parish of *F.* whereupon he was removed to the parish of *Pulborough* by an order of two justices; *Pulborough* appealed to the sessions, who state this matter specially, and being of opinion that *W. O.* gained a settlement at *Fittleworth*, quashed the order of the two justices.

A certificate person comes from one parish to another, and is chosen tithingman, but before he has served the office a year, becomes chargeable, he is removable.

And now it was moved by Sir *John Strange* and Mr. *Eurrell* to quash the order of sessions, and to confirm the order of the two justices, they insisting that the pauper had gained no settlement at *F.* 1st, Because the manor where he was chosen and sworn tithingman, did not extend through the whole parish; 2^{dly}, Because he did not serve the office a whole year, and was actually removed before the

PART I.

Y

year

year was expired; and of that last opinion was the whole court, so quashed the order of sessions, and confirmed that of the two justices. *Lee* Ch. Justice said, that as soon as the *pauper* became chargeable, the two justices had jurisdiction to remove him, but laid no stress upon the manor or office not extending through the whole parish; but they all held, that he must serve the office for a whole year, or could not thereby gain a settlement.

N. Mr. Justice Chapple was absent all this term by reason of sickness.

Anonymous. In Chancery.

If the plaintiff in Chancery reply to a plea in bar, he admits it to be good in law.

IT is a rule in the court of Chancery, that if the defendant pleads in bar, the plaintiff must either set down the plea to be argued if he think it not good in law; or, if he think it good, he must reply to it and put the facts of the plea in issue; and when the plaintiff has replied, he thereby has admitted the plea to be good in point of law.

Hilary Term

18 Geo. 2. 1744.

Ante.

Lord Inchiquin *versus* Lord O'Brien. In Canc. coram Lord Hardwicke 7 Feb,

Where the personal estate shall be first applied to the payment of debts, though the real estate be charged therewith.

LORD *Thomond* by his will (*inter al'*) devised in this manner: "As to my worldly estate both real and personal, I "dispose thereof as follows; first, I will that all my debts "which I shall owe at the time of my death shall be paid." Lord Chancellor said, if the will had gone no farther this would have been sufficient to have charged his real estate with his debts, in case his personal estate had fallen short: Then he goes on in his will and devises his real estate to trustees, upon trust that they shall sell such a competent part thereof (for the most money that could

could be got) as shall be sufficient for payment of his debts and legacies; "And my further will is, that the money to be raised by sale of my real estate shall be deemed as personal;" and then he gives all the rest and residue of his personal estate to Lord O'Brien after payment of his debts and legacies.

It was proved in this cause by plaintiff, that Lord Thomond's personal estate at the time of making his will was about 8000*l.* and it was proved by the defendant that it was about 15000*l.* but at the time of Lord Thomond's death it was about 33000*l.* and his debts about 50000*l.* his real estate 8000 or 9000*l.* *per ann.*

The question in this cause was, whether the personal estate (*viz.* that part which was properly so, his chattels) should go to Lord O'Brien, discharged of the testator's debts and legacies.

Lord Chancellor: This question depends upon the rules adhered to in a court of equity and the precedents there, and upon the meaning of this will and of the application of those rules to it. By law as well as equity the personal estate is the first and proper fund for payment of debts, and in this court as well as the spiritual court, is the only fund for payment of legacies. If the personal estate be exempted from the payment of debts or legacies, it must be done either by express words, or by a plain intention arising from the whole tenor of the will; and if it is exempted, it must appear that it is given away by a specific bequest; and this must be taken along with it, that there is another fund raised for payment of the debts: and when a man by his will charges his real estate with payment of his debts, &c. or directs it to be sold for that purpose, there is no difference, for there are many cases that prove this, and yet if the personal estate be not expressly exempted, or implicitly, *viz.* by devising it specifically, it shall be first applied in exoneration of the real estate; and to direct a real estate to be sold out and out, is very different from the present case, for it is only said here, that a competent part thereof shall be sold, and there is no case wherever it was pretended that the personal estate was exempted where the rest and residue was given in this manner, *viz.* "After payment of my debts and legacies;" and the meaning of the testator must have been, that in case his personal estate should fall short, then that a competent part of his real estate should be sold; but to take off the force of this it is insisted that by these words in the will, "And my further will is, that the whole money to be raised by sale of my real estate shall be deemed as personal", the testator meant that so much of his real estate should be sold as should be equal to his proper personal estate, and should be added to the same, and that out of *that* aggregate fund, the debts, &c. should be paid, and after payment out of *that* aggregate fund, the residue should go to the residuary

fiduary legatee; but I see no foundation for this construction, for it was never heard of, that because a residue of a personal estate was given, that, at all events some residue must pass by the will; for no man can tell at the time of making his will how his personal estate may be increased or diminished, or how long he may live; so he decreed the personal estate first chargeable with the testator's debts and legacies. *Vide Walter v. Bigg, or Pink, 31 July 1736 Chester and Painter, 2 Wms. Bampffield and Windham, Prec. in Eq. Wainwright and Benlow, 2 Vern. Prec. in Canc, 451. Barkham and Bethlem Hospital, Stapleton and Colevill. Bromball and Wilbraham. Hosslewood and Child, August 30, 1734.*

Ormichund *versus* Barker, In Chancery,

An infidel pagan idolater may be a witness.

IT was held by the Lord Chancellor, assisted by Lord Chief Justice *Lee*, the Master of the *Rolls*, the Lord Chief Baron and Justice *Burnett*, that an infidel pagan idolater may be a witness, and that his desposition, sworn according to the custom and manner of the country where he lives, may be read in evidence; so that at this day it seems to be settled, that infidelity of any kind doth not go to the incompetency of a witness; in the debate of this point, *Ryder* the Attorney General cited the covenant between *Jacob* and *Laban*, *Genesis*, cap. 31. v. 52, 53. where *Jacob* swore by the God of *Abraham*, and *Laban* swore by the God of *Nabor*. *Vide Psalm 115; 106. v. 36.*

Easter Term

18 Geo. 2. 1745.

SIR *William Chapple* Knight, one of the Judges of the King's Bench, died in the last vacation, and upon the first day of this term Sir *Michael Foster* Knight, serjeant at law, was sworn one of the Judges of the same court in his stead, and upon the same day *Edward Clive*, Esq; a learned barrister, was called to the degree of serjeant at law, and sworn one of the barons of the court of Exchequer in the place of Sir *Lawrence Carter*, who also died in the last vacation; but baron *Clive* was in so bad a state of health that he was not able to take his place this term, The motto of his ring was *Non vis exiget otium. Hor. lib. 4. od. ult.*

Bradburn *versus* Taylor. B. R.

THIS was an error upon a judgment in the Common Pleas, and the error assigned was, that the defendant (as it appeared by a *certiorari* to the clerk of the warrants of the Common Pleas and his return thereof) had affiled his warrant to defend by *William Round* his attorney, and that it appeared by the judgment which was transcribed that the defendant appeared and defended by *George Long* his attorney; but *per curiam*, this error assigned is contrary to the record, therefore the judgment must be affirmed. *Vide 1 Strange 684. Ld. Raym. 1414.*

Error contrary to the record may not be assigned.

Honour *versus* Whetherhead or Whitehead. B. R.

THIS was a rule to shew cause why the defendant should not be discharged out of the county gaol of *Surry* upon common bail, he having been discharged as an insolvent fugitive by the justices of peace for that county, upon the *stat. 14 & 15 Geo. 2.* upon this case. The defendant was born in *England*, and when he was very young was carried over in his mother's arms to *Boston* in *New England*; he grew up to be a merchant abroad, and traded to *Great Britain*, and was himself in *New England* when he contracted

Insolvent debtor.

PART I. Z all

all the debts he owes, and (among others) being indebted to the plaintiff in a large sum of money, came over to *England*; and rendered himself to prison according to the statute, in order to take the benefit thereof, which the justices have granted him, as thinking him an object within the fugitive act, since which he has been arrested for the plaintiff's debt.

And now Sir *John Strange* shewed cause why the defendant should not be discharged upon common bail; and 1st, He insisted the defendant was not within the statute, his debts having been contracted abroad; 2^{dly}, That the act directed that fugitives should render themselves to the gaol of that county wherein they resided for the last six months before they fled; and cited a case (wherein he himself was concerned) of *Cann v. Boyd*, Mich. 13 Geo. 2. *Boyd* was born in *Ireland*, was put apprentice to a merchant in *Holland*, and served his time, then set up for himself, failed, and fled to *Ireland*, stayed there until the insolvent act, then came over to *England* and rendered himself, and obtained his discharge thereupon at the quarter-sessions; being afterwards arrested for a debt which he contracted with the plaintiff a merchant in *England*, obtained the like rule to shew cause, as in the case at bar; and it was strongly insisted that he was a debtor here, that he was in foreign parts, that he came over on purpose to take the benefit of the act, that the intent thereof was to invite persons hither who were afraid of a gaol: but the court thought him not within the description of the preamble, so not within the statute, and discharged the rule. And in the case at bar the court took time to consider.

Symonds versus Parmenter and Barrow. B R.

Side bar rule obtained without disclosing the whole circumstances of the case shall not be suffered to stand.

THIS was an action upon a bill of exchange against the two defendants jointly by original writ; the defendant *Parmenter* only appeared, so that the plaintiff was under the necessity of proceeding to the outlawry against *Barrow* before he could declare against *Parmenter* alone; accordingly *Barrow* was outlawed, which outlawry the plaintiff shewed in his declaration; to this, *Parmenter* pleaded there was no such record of outlawry; the plaintiff replied *quod habetur tale recordum*. The plaintiff's attorney discovering that there was a mistake in the record of outlawry, applied to the proper officer to amend the same, agreeable to the *exigent* and proceedings that had been upon the outlawry, who told him he would take care to set it right; accordingly the officer (filacer) applied to the court at the side bar, and obtained of course a rule to amend the record of outlawry by the proceedings which had been thereupon, but without acquainting the court at the same time that *Parmenter* had pleaded *Nul tiel record*. And now upon shewing cause why this side bar rule

rule should not be set aside, the court said they would not suffer a side bar rule to stand which had been obtained in this unfair manner, in not acquainting them with the whole circumstance of the matter, and that they would not let the amendment be made without hearing *Parmenter*, who was greatly affected thereby; for if the record of the outlawry was not agreeable to the declaration, *Parmenter* at present had a very good defence in pleading *Nul tiel record*; so the side bar rule was discharged *per totam curiam*. But afterwards at another day this term, the court, upon hearing counsel on both sides, ordered the amendment to be made in the entry of the outlawry agreeable to the process, and the officer to pay defendant his costs, and the defendant to have liberty to plead *de novo*.

Between the Parishes of Sheephead in Leicestershire
and Milburn in Derbyshire. B. R.

THOMAS *Membury* a certificate-man came from the parish of *Sheephead* to the parish of *Milburn*, by a certificate dated November 1733. was a schoolmaster, and taught the charity-school there until his death in 1743. but in what manner he was admitted to this school it does not appear, but only in general that he officiated till his death. That lady *Ann Hastings* had by deed conveyed to trustees ten pounds *per ann.* in trust to be paid to the vicar of *Milburn* for the time being for the charity-school; that this 10*l.* *per ann.* had not been appropriated to any other use than paying it to the schoolmaster; and whether *Thomas Membury* had gained a settlement at *Milburn*, either as serving an office, or as having a freehold in the school of 10*l.* a year, was the question; and the sessions were of opinion, and declared he gained a settlement there, as having had a freehold in the school

2 Stra. 1225.
S. C.
Schoolmaster
who is a certificate man
gains no settlement.

But *per curiam*, (*absente Fester J.*) a schoolmaster is not an office, but only an employment; and what interest *Thomas Membury* had in the school, whether for life, or how otherwise, or how he was admitted to, or came into this employment, does not appear; and that the vicar is the person intitled to the 10*l.* *per ann.* and not choosing to teach the school himself paid it to this poor man as his deputy, which could not gain a settlement for any person whatever; so the order was quashed. Mr. Gundry, Mr. Ford and Mr. Wilmot of counsel for *Sheephead*; Sir John Strange and Floyd for *Milburn*.

Martindale

Martindale *versus* Fisher. B. R.

Averment.
Promise for
promise is a
good confi-
deration in an
action on an
assumpsit,
without an
averment of
the perform-
ance of the
promise of
plaintiff.

THIS is a special action upon the case, wherein the plaintiff sets forth in his declaration that an horse-race was agreed to be run between an horse of the plaintiff and one of Sir *Marmaduke Wyvill's*, and that in consideration that the plaintiff had agreed to deliver to the defendant three yards and one eighth of cloth, the defendant agreed to pay to the plaintiff 5*l.* 12*s.* 6*d.* in case Sir *Marmaduke Wyvill's* horse should beat the plaintiff's horse, but if the plaintiff's horse beat Sir *M. W.'s* then defendant to pay nothing for the cloth; and avers, that Sir *M. W.'s* horse won the race; upon the general issue there was a verdict for the plaintiff. It was now moved in arrest of judgment, and the exception taken to the declaration by serjeant *Bootle* was, that it is not averred in the declaration that the cloth was delivered to the defendant; but to this it was answered by Mr. *Ford*, and resolved by the court, that this was an action founded on mutual promises, and that here was only promise for promise, and therefore it was not necessary for the plaintiff to make an averment in his declaration of the delivery of the cloth; and the court said the case of *Nicho's and Raynbred, Hob. 88.* is in point. *Dennison J* said, that where a plaintiff declares that in consideration he the said plaintiff would deliver to the defendant a piece of cloth to the defendant, that the defendant should pay such a sum of money for it, in that case an averment of the delivery of the cloth is necessary; but if plaintiff states an agreement, and then lays it that in consideration of such a promise or agreement, &c. there is no need of an averment. So *N. B.* the difference. And the *Posse* was ordered to be delivered to the plaintiff. *Vide Hob. 106. Yelv. 136. 1 Lev. 293. Hard. 103.*

Vavafor & al' Executors *versus* Faux. In Error. B. R.

Several judgments against three executors defendants, two of whom only join in bringing error, is bad.

THIS was an action of debt brought in the court below by *Faux* against *Vavafor* and two other persons executors; one of the defendants pleaded *Plene administravit* generally, upon which *Faux* took judgment against him *de assets in futuro quando acciderint*; the other two defendants pleaded judgments & *plene administraverunt ultra*; *Faux* replied that the judgments were obtained *per fraudem*, and upon the trial had a verdict, whereupon those two defendants brought a writ of error; some trifling objections not worth setting down were taken to the declaration, and the court said the only question here was, whether this writ of error was properly brought by the two defendants below, without joining the other defendant, against whom there is judgment *de assets in futuro*; and if

if there be any material exception to the declaration, the judgments must be reserved *in toto*; and they were of opinion at present that all the three defendants below ought to have joined in bringing the writ of error, and that they not all joining, is an objection that cannot be got over. *Uterius concilium.*

And afterwards this point was spoken to again June 24, 1745. when the writ of error was quashed without costs. *Vide 2 Stra.* 977.

Noke and Chiswell *versus* Ingham. In Error. B. R.

IN an action upon several promises brought in the Common Pleas by Ingham against Noke and Chiswell jointly as partners; Noke pleaded a judgment recovered in C. B. by Ingham against them both upon the same promises; Ingham replied *nul tiel record*, and upon issue thereon judgment was given against Noke, and a writ of inquiry of damages awarded; and final judgment; Chiswell the other defendant pleaded that he was a bankrupt, and that the cause of action arose before he was a bankrupt; and upon this issue is joined, whereupon the plaintiff Ingham below entered a *nolle prosequi*, viz. that he will not proceed any further as to the issue joined between him and Chiswell.

In an assumption against two persons who sever in pleading, a *nolle prosequi* may be entered as to one, and it shall not destroy the action as to the other. Bankrupt.

/ Same 15.

And now upon a writ of error brought, Mr. Ford for the plaintiff's in error objected, 1st, That this being an action against two persons upon a joint contract, and the plaintiff below having entered a *nolle prosequi* as to one of them, hath thereby discharged them both; 2^dy, He objected that the entry of the *nolle prosequi* being by attorney was erroneous, for it ought to have been by Ingham in person.

And in support of the first objection was cited *Boulter v. Ford*, 1 Sid. 76. which was covenant against two, who covenanted to build a house in a workmanlike manner; one pleaded performance, and upon trial it was found for him, the other suffered judgment to go by default; and it was held by the court, that the verdict having found the covenant performed, discharged them both, and that both defendants should have their costs. *Blake's case*, 1 Sid. 378. was also cited to shew that in all cases where an action is brought upon a joint contract against several defendants, and one of them is discharged by nonsuit of the plaintiff, they shall thereby be all discharged. And to support the second objection, *Cro. Jac.* 211. 8 Rep. 58. *Co. Lit.* 181. b.

Serjeant Draper for the defendant in error, 1st, By the statute of 10 Annæ, c. 15. the discharge of a debt as to one partner becomes

PART II.

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Cro. Car. 239.
243.
2 Hawk. P.
C. 196.

ing a bankrupt shall not discharge the other partner. 2dly, There is a great difference between a *nolle prosequi* and a *retraxit*, the first being only in nature of nonsuit, and is no bar to a future action for the same cause, but the latter is a bar to a future action, and so a compleat discharge thereof; for it is considered as a departure in despite of the court, and is used to shew that the plaintiff ceases to prosecute his whole suit for ever; but a *nolle prosequi* may be as to part; and the action may be brought against both partners, though one pretends to be a bankrupt, for the plaintiff may falsify the certificate of the bankrupt. Stat. 5 Geo. 2. for if the plaintiff be obliged to proceed against one only, he will lie under great difficulties, because he must then set forth that the other is a bankrupt, which is a matter out of his knowledge. As to the objection to the manner of entering the *nolle prosequi*, precedents are in various ways, some that the party came (not saying either in person or by attorney) others, that he came by his attorney. 1 Saund. 202, 205, 339. 342. Co. Ent. 172. b. there it is by attorney, Raft Ent. 654. b.

Difference
between a
nolle prosequi
and a *retraxit*.

Lee Ch. Justice: It is agreed on all hands, that in trespass against several, the plaintiff may enter a *nolle prosequi* as to one, and that will not discharge the other, and therefore I cannot see why it may not be done in this case; and I do not see how so proper an advantage can be taken upon the stat. Annæ, (as to the bankrupt) as is now taken by the entry of this *nolle prosequi*; a *retraxit* is a total relinquishment of the suit, and has a very different operation from a *nolle prosequi*; I am of opinion that the judgment ought to be affirmed: Wright J. of the same opinion; Dennison J. of the same opinion; and further said, that the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration; but that is not the case here; this case is exactly the same as where an action is joint and several, for the stat. 10 Annæ, c. 15. has made the partner (not a bankrupt) liable for the whole debt; and I never saw a declaration where upon a joint contract it was suggested that one of the defendants was a bankrupt; and it might be doubtful at the time of bringing the action whether the person was a bankrupt or not; and I think this the most proper way of declaring, and the most proper form of entry; and this case is the very same, (as to this matter of entering a *nolle prosequi*,) as if it had been trespass against several defendants. The judgment was affirmed.

Coleby *versus* Norris. May 14, 1745. B. R.

A Copy of *mesne* process was served upon the defendant, which upon the backside thereof was dated at a day to come (20 May 1745.) and even after the return of it, the process itself was so likewise; *Lawson* moved to set aside the writ; but *per curiam*, (*absente Lee C. J.*) the indorsement of the date on the back of the writ is no part of the writ, the *teste* being right is sufficient, and he took nothing by his motion.

The date of a writ is no part of it, if the *teste* be right it is well enough.

Serjeant *versus* Read. B. R.

THIS is an action of trespass against the defendant, who is servant to the corporation of *Pensance*, for taking and carrying away three bushels of barley; the defendant pleads that one *Richard Daniel* was seised in fee of the manor of *Pensance*, in which there was a quay or pier which was parcel of the said manor, and that he and all those whose estate he had, at their own costs and charges for time out of mind, had repaired and ought to repair the said quay or pier, and had of right taken a reasonable duty called bushelage, to wit, three *Winchester* bushels of barley out of and for every ship's cargo of barley brought upon the said quay to be exported in any ship; and that he the said *Richard Daniel*, by indenture of bargain and sale, for the considerations in the said indenture mentioned, conveyed the said quay or pier to the corporation of *Pensance*, to hold to them and their successors in fee farm for ever; and that by virtue of the said bargain and sale, and of the statute of uses, the said corporation became seised in their demesne as of fee, then he shews in his plea that the plaintiff brought upon the said quay, a ship's cargo of barley containing 1200 *Winchester* bushels to be exported; and that he, as servant to the corporation, and by their command, took out of the same ship the three bushels of barley in the declaration mentioned, as it was lawful for him to do by virtue of the said prescription; the plaintiff replies that the defendant took the barley of his own wrong, and traverses the prescription; and thereupon issue is joined, and a verdict is found for the defendant in favour of the prescription.

2 Stra. 1228. S. C. Prescription for three bushels of barley out of every ship's cargo brought to a quay to be exported is good.

And now it was moved in arrest of judgment on the behalf of the plaintiff by Serjeant *Belfield*, Mr. *Banks*, and Mr. *Gould*, and two exceptions were taken.

1st, To the prescription: That notwithstanding the jury have found for the defendant, yet that the prescription is void in law,

as being both uncertain and unreasonable, as to take a certain quantity out of an uncertain one, no body being able to say how much was a *ship's cargo*; and it may be a small or a large cargo, and three bushels out of each such different cargoes can never be a reasonable proportion; also that the prescription is not properly pleaded, because it is without exemption to any persons whatever, and that it is well known, tenants in ancient demesne might be exempted, and so are the precedents with respect to tolls; also that it was unreasonable in this, that a man might bring corn in order to be exported, and yet not export but carry it back again, in such case to take three bushels would be unreasonable.

To this it was answered by Sir *John Strange*, Mr. *Gundry*, Serjeant *Draper* and Mr. *Henley* for the defendant, and resolved by *Lee Ch.* Justice and the whole court, that the word *cargo* is a mercantile term, and very well understood when referred to a ship, and is sufficiently certain; and this case is very much like the case of stallage, the party bringing his corn to the quay having an easement, the owner of the quay a damage; so in *Lutw.* 1519. There was a prescription for so much money for setting up a stall in a fair, and for ground near the stall; and it was objected this was uncertain how much ground; but it was held a good prescription, for the quantity of ground near a stall is to be determined by the usage of the fair; and the case in *T. Raym.* 233. is not like the present case, for the objection of Lord *Hale* was there, that it did not appear what quantity of salt was in the ship, and perhaps there might not be above two bushels, but in the case at bar, the quantity of barley appears; and as to the manner of pleading this prescription without excepting any persons, if it had been pleaded otherwise it would have been wrong, for this is a general prescription.

The 2d exception was to the title made to the corporation, that the indenture of bargain and sale made by *Richard Daniel* to the corporation, is only said to be for the considerations therein mentioned, whereas it ought to have been pleaded to have been in consideration of money, or for a valuable consideration, and that nothing can pass by bargain and sale without a pecuniary satisfaction. 1 *Lev.* 170. 1 *Rep. Mildmay.* 3 *Lev.* 233. *Mo.* 569.

To this it was answered and resolved by the court, that 3 *Lev.* 233. was the only case cited like to this, and which the Chief Justice said he did not well understand; that the cases mentioned were upon demurrer, but this is after a verdict; and it is further pleaded in this plea, that by virtue of the indenture, which was made so long ago as 1614. the corporation entered and were seised, and therefore the court will intend there was a good and valuable consideration,

tion, especially as the plaintiff has not thought proper either to crave oyer of the bargain and sale, (of which there is a *profert in curiam*) or to demur to it, which he ought to have done if he had thought it insufficiently pleaded, and if it be not so well pleaded as it might have been, he is now too late after the verdict to take advantage of it, it might have had another consideration upon demurrer. Judgment for the defendant.

Rex *versus* Bull. B. R.

MR. Lloyd moved for an information upon the *stat. H. 5. c. 4.* against Bull for practising as an attorney when he was under-sheriff, but it was refused because the affidavit upon which he moved, only swore that he practised as an attorney, without mentioning what particular acts he did as such, that the court might judge whether such acts were practising as an attorney. Lee Ch. Justice said an information was granted against one Husk, undersheriff of *Huntindonshire* for the like offence.

Information
for practising
as an attorney
while he was
under-sheriff.

Trinity Term

18 & 19 Geo. 2. 1745.

Walker *versus* Robinson. B. R.

TRESPASS for assaulting the plaintiff, stopping his waggon, and taking away a cart-rope; the defendant by way of justification pleads that *Doncaster*, the place in which, &c. is a borough by prescription, and that the corporation have a right to toll of all goods passing through the town, in consideration of repairing the streets thereof; that the plaintiff was passing through the town with his waggon loaded with goods, and the defendant, as collector of the toll, demanded of him two pence; that the plaintiff refusing to pay it, he took the cart-rope as a distress; the plaintiff by his replication says, that the defendant did

2 Stra. 1232.
S. C.
Costs:
No more costs
than damages
when the
judge certifies
on the stat.
43 Eliz. c. 6.

PART I.

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not demand the two pence before he distrained the cart-rope, and thereupon issue is joined, and a verdict is for the plaintiff, and one shilling and six pence damages. This cause was tried before Mr. Justice *Burnett*, who certified upon the *stat. 43 Eliz. c. 6.* upon the *posse* in these words, "I do hereby certify that the damages to be recovered in this action do not amount to forty shillings, but to one shilling and six pence, and no more."

Bootle serjeant came up last term, and moved for full costs; and now *Poole* for the defendant in shewing cause, insisted that the plaintiff was intitled to no more costs than damages in this case, which is expressly within the *stat. 43 Eliz. c. 6.* "That in any action personal brought in the courts at *Westminster* not being for any title to lands nor for a battery, if it appear to the Judge who tries the cause, and be set down by him that the damages shall not amount to 40 shillings, or above, the court shall not award costs to the plaintiff any greater or more than the sum recovered shall amount to, but less, at the discretion of the court." It was insisted by the Serjeant, that there being an *asportavit* laid in the declaration, increase of costs had always in such case been given by the court; to which it was answered, that all those cases were upon the construction of the 22 & 23 *Car. 2. cap. 9.* that where there is an *asportavit*, the Judge cannot certify upon that statute, but such case is within the *stat. of Glouc.* it does not therefore follow but that an *asportavit* may be within this *stat. 43 Eliz.*

It was also insisted for the plaintiff, that in cases of special pleading, if a verdict be for the plaintiff, the court has always awarded an increase of costs; to which it was answered that there can be no legal foundation for full costs, unless the right of freehold comes in question, or in a *son assault* where the battery is confessed, for it would be doing contrary to the express enacting clause of the *stat. 43 Eliz.* And the case of *Butler and Reeves*, *Gilb. Rep. 195.* was upon the *stat. Car. 2.* In the case of *White v. Smith* in *C. B. Paschæ 1744.* for taking and carrying away sand, there was a verdict for the plaintiff, and less than 40 shillings damages; and *Willes Ch.* Justice certified they were the proper damages upon this *stat. 43 Eliz.* And the court would not allow more costs than damages.

Bootle Serjeant replied, that the statute of 43 *Eliz.* as to this matter has never been put in ure (before the late case in *C. B.* mentioned,) and that is a virtual repeal of it according to *Co. Lit. 81.* and he said that the *stat. 22 & 23 Car. 2.* was a repeal of *stat. 43 Eliz. pro tanto.*

Lee Ch. Justice: Although I do not remember that the *stat. 43 Eliz. c. 6.* was ever put in ure, yet it is a subsisting statute, and if

if this case be within it, we must judge accordingly, for I do not know that this court has any power to disallow acts of parliament; this is merely a personal action, where no freehold was in question neither was there any battery, but only an assault, and as the Judge who tried the cause has certified that 1 s. 6 d. are the damages, I think there is nothing to take it out of the *stat. 43 Eliz.*

Wright Justice, ad idem.

Dennison Justice: This is a new case; I have heard it said that this *stat. of 43 Eliz. c. 6.* had been explained away, but imagine that arose from its never having been put in ure. This *stat. of Eliz.* was intended to explain the *stat. of Glouc.* which was evaded by laying the damages in the declaration above 40 shillings, and was to enforce the true meaning of the statute of *Glouc.* and therefore enacted, that if the Judge would certify that the damages given were the proper damages, and which the jury ought to give and no more, so that it might appear that the action ought properly to have been brought in an inferior court, then the superior court was to allow no more costs than damages. I confess I think there are many actions, and that this is one of them, where neither the freehold may come in question, nor any battery confessed or proved, very proper to be brought in a superior court, though the damages may not amount to 6 d. for the *quantum* of damages here are not so much the matter in controversy, as the prescription and right to the toll. The *stat. of Eliz.* and that of 22 *Car. 2.* are very different, the *first* by certificate deprives the plaintiff of full costs, the *other* by certificate intitles him to full costs; but notwithstanding I think this a proper action to be brought here, yet as the Judge has certified, I cannot see how this court can adjudge directly contrary to an act of parliament. The action of battery was possibly put into the *stat. 43 Eliz.* because it might be then thought that such action would not lie in the county court, and to be sure it will not with *vi et armis*, but I do not know but it will lie without *vi & armis.* *Foster J. ad idem.* And the rule to shew cause why the plaintiff should not have full costs was discharged *per totam curiam.*

Between

Between the Parish of Petroch in Devonshire and
Stoke and Fleming. B. R.

A poor parish
girl bound to
serve till 21,
(without say-
ing or till
marriage) and
assigned over
to another,
gains a settle-
ment where
she last served.

ANNE Giles was removed by order of two justices from *Petroch* to *Stoke Fleming*; upon an appeal, the sessions state specially, that *Ann Giles* was bound by indenture as a poor parish child, with consent of two justices, to *Rebecca Gregory* of the parish of *Petroch*, to serve from 1733. the date thereof till her age of 21 (not said or marriage, as directed by the *stat 43 Eliz.*) that she served *Rebecca Gregory* under that indenture five years till *July 17, 1738.* when *Rebecca Gregory* agreed with *Phillip Fowle* of *Stoke Fleming*, to assign over to him her apprentice; accordingly *Rebecca Gregory* delivered up to *Philip Fowle* the indenture, and by an indorsement thereupon assigned to him all her interest therein; that upon the same day *Ann Giles* being then 14 years old, bound herself by another indenture to *Philip Fowle* to learn houswifry, and to do such other business for him as he should have to do, and served him from that time till 1744. in the parish of *Stoke Fleming*; that the day before the order of two justices was made, the sessions vacated the indenture of apprenticeship, whereby the pauper was first bound to *Rebecca Gregory*, (but the court said they could take no notice of that, because it did not appear that this vacating the first indenture had any influence upon the two justices in making their order.)

Mr. Gundry moved to quash the order of the two justices; 1st, Because the first indenture was not made according to the *43 Eliz.* which says that poor girls shall be bound to serve till 21 or marriage, and it is till 21 absolutely, which is void. 2^{dly}, That an infant has no power to bind herself, so the second indenture is void; or if the first indenture should be thought by the court to be well enough, yet there can be no legal assignment thereof, so service under one or other of these will gain no settlement.

To this it was answered by *Mr. Stracy*, and adjudged by the court, that the first indenture is well enough and only voidable, and it is stated there was an indorsement whereby *Rebecca Gregory* assigned all her interest and term to come in the apprenticeship, and the girl binding herself to *Philip Fowle*, is only her consent to go to serve him. To be sure strictly speaking, an apprentice cannot be assigned over by law, except in *London* by the custom. In the case of *St. Nicholas* and *St. Peter's Ipswich*, where a boy was bound under the *43 Eliz.* for four years and served them, the court held he gained a settlement; so the order of the two justices was confirmed, the pauper having gained a settlement at *Stoke Fleming*, where she last served.

Rex

Rex *versus* Gilbert. B. R.

DEFENDANT was brought up by a *habeas corpus*, upon the return whereof it appeared that he was committed upon the *stat.* 9 Geo. 2. for being taken with fire-arms in company with several other persons feloniously assembled, aiding and assisting in the clandestine running of goods; Mr. *Smythe* moved that he might be admitted to bail, as being pardoned by the *stat* 18 Geo. 2. But *per curiam*, This offence is not pardoned by the statute, and the defendant if he thinks proper, may upon his trial plead the statute, but, as at present advised, we think this crime is not pardoned by the 18 Geo. 2. so the prisoner was remanded.

Assisting in running goods not pardoned by the *stat.* 18 Geo. 2.

Simmonds *versus* Parmenter & al'. B. R.

CA SE upon a joint bill of exchange, one defendant is outlawed, and the plaintiff declares against the other setting forth the outlawry; the defendant craves *oyer* of the original writ and record of outlawry thereupon, and then pleads *nul tiel record*, without inserting the *oyer* which he had craved and had; the plaintiff replies *quod habetur tale recordum*, and after the paper-book was made up, it was moved by Serjeant *Wynne* and others on the behalf of the plaintiff, that the defendant might be obliged to insert the *oyer* (which he had craved) in the paper-book. But *per curiam*, Such a motion was never known, and if the plaintiff had a mind to set forth the *oyer* or record of outlawry, he may do it in his replication; for the party who has had *oyer* may do as he pleases, whether he will set it forth in his plea or not; so the plaintiff then moved for leave to amend his replication, by inserting the record of the outlawry, which was granted upon payment of costs.

Where the defendant has *oyer* given him of a record which is set out in the declaration, he need not set it forth in his plea.

Cited 2 *Lutw.* 1695. and 2 *Barnes* 256. *Weavers Co. v. Ware*
1 *Barnes*, *Spinks v. Bird*, 66.

N. When *oyer* of a bond is demanded, the defendant, when he comes to plead, seldom sets forth the whole bond, but only the obligation or condition, or so much thereof as makes for his purpose.

Cooke *versus* Berry. B. R.

New trial never granted for want of evidence which might have been produced at the trial.

ASSUMPSIT upon a promissory note; defendant pleaded that the plaintiff accepted of some chests of tea in satisfaction, upon which issue was joined, and there was a verdict for the defendant; it was now moved on behalf of the plaintiff by Sir *John Strange* and Mr. *Crowle* for a new trial, upon an affidavit that the plaintiff took this to be a sham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had disposed of the tea to another person, and wherein the defendant says he will pay the plaintiff his money due upon the note, which letter the plaintiff did not produce at the trial, thinking the plea was a sham, and that the defendant could not possibly prove it.

In a *sci. fa.* on a judgment the defendant has a release and omits to plead it, he shall not have an *audita querela*.

2 Salk. 653.
2 Mod. 22,
222.

But *per curiam*, New trials are never granted upon the motion of a party where it appears he might have produced and given material evidence at the trial if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this. Suppose in a *scire facias* upon a judgment, the defendant has a release, he is summoned, and has an opportunity of pleading it, and does not, he shall never have an *audita querela*; this is a very strong case at bar, for the plaintiff has notice of the defence of the defendant in his plea, and ought to have come prepared to falsify it at the trial. And *Dennison J.* said he remembered a case of a horse plea, where the defendant pleaded he gave the plaintiff a horse in satisfaction; plaintiff looked upon it as a horse (or sham) plea indeed; but the defendant at the trial proved it a true plea. Rule to shew cause why there should not be a new trial was discharged.

Barlow *versus* Evans. B. R.

Scire facias against bail in error of a judgment for damages in the C.B. must be to shew cause why the plaintiff should not have execution of the debt aforesaid and not damages

SCIRE *facias* against bail upon a writ of error of a judgment in the Common Pleas for certain damages, setting forth that *A.* recovered against *B.* certain damages, and that the defendant bound himself in a recognizance in 193 *l.* to be levied upon his lands and chattels, in case the plaintiff in error did not prosecute his writ of error with effect; then the *scire facias* commands the sheriff to give notice to the defendant (the bail) to shew cause why the plaintiff should not have execution of the damages aforesaid, according to the form of the recognizance aforesaid; the defendant demurs, and shews for special cause that the word *damages* aforesaid is wrong, and that it ought to be *debt* aforesaid; the plaintiff joins in demurrer.

Ford

Ford for the defendant, insisted that a *scire facias* is a new action, and in the nature of a declaration. 1 *Inst.* 290. b. And that if an action had been brought upon the recognizance it must have been debt; and here the demand is not of damages and costs in the original action, but of the specific sum of 193 *l.* entered into by the recognizance, and so prayed judgment that the *scire facias* might be quashed.

Luke Robinson for the plaintiff, insisted it is well enough, for the *scire facias* is for the defendant to shew cause why the plaintiff should not have execution of the damages aforesaid, according to the form of the recognizance aforesaid, and the word damages may be considered only surplusage.

But *per curiam*, This is upon a special demurrer, and the particular defect in the writ is pointed out, which the plaintiff might have amended; it ought to have been to shew cause why the plaintiff should have not execution of the said debt of 193 *l.* according to the form of the recognizance aforesaid, and no case has been cited to shew that wherever a defect has been pointed out by a demurrer, that the court have considered such fault a surplusage, and they said they thought it was not surplusage. Judgment that the writ be quashed.

Douglas *versus* Hall. B. R. In Error.

TRESPASS, assault and battery in the C. B. Not guilty, verdict and judgment there for the plaintiff below. Error is brought, and upon the common errors assigned, it is objected for the plaintiff in error that there are two counts in the declaration, and both of them are by way of recital with a *quod cum*, &c. which is error, and cited by Mr. *Stracey*, 2 *Lev.* 206. 2 *Bull.* 206. 2 *Sbo.* 2 *Salk.* 636. 27, 295, 447, and *Norman v. George*, Hil. 4 Geo. 2. which was trespass, assault and battery in C. B. and error after a verdict for the plaintiff below, and was the very same point as now at the bar, and he said he was informed the judgment was reversed.

Draper Serjeant on the other side, admitted all the old cases to be as cited, but insisted that of late it had been otherwise resolved, and that the count might be made good by the writ which is set out in the declaration, and is affirmative; and to shew that counts in trespass are helped by the writ-part of the declaration cited 1 *Sid.* 137. and *Franklyn v. Reeve* B. R. Mich. term 9 Geo. 2. error of a judgment from the C. B. in trespass, where after the setting out the writ in the declaration the plaintiff counted for taking and carrying away divers loads of dung and soil, without saying of his the said plaintiffs,

plaintiff's, and the court held it was made good by the writ-part of the declaration.

Lee Ch. Justice : The case of *Norman* and *George* was the very same as this, but what judgment was given I cannot say, or whether any: But as at present advised I think this declaration is well enough, it sets forth the writ, that the defendant was attached to answer the plaintiff of a plea of trespass, wherefore with force and arms, &c. and then the declaration upon that writ is *quod cum*, &c. the writ and count may be considered as one, and I think the *quare vi & armis* in the beginning is a sufficient averment. 1 *Sid.* 150, 187. 1 *Lutw.* 1509. *Cro. Eliz.* 185, 198. to shew that the writ and count are one: upon the whole, I think the *quod cum* is helped by the *quare vi & armis*, &c. I do not indeed remember any case in this court by bill where this fault has been helped.

Wright Justice inclined to the same opinion, and said that by the note he had of *Norman* and *George*, no judgment was ever given in it.

Dennison Justice : I am glad the court is inclined to get over this objection; I heard the case of *Norman* and *George* spoken to, and the difficulty with the court was, that where any thing is objected as a variance between the count and the writ upon a writ of error, they thought they could not take notice of it without the writ was brought hither; this stuck with them at that time. Where the writ is set out in the declaration in *C. B.* it shall be taken to be as set out, 2 *Vent.* 153. 2 *Lutw.* 1180. The present case in short is this, that the defendant was attached to answer why he assaulted the plaintiff, then he counts upon the writ with a *quod cum*, &c. I think we may reject the *quod cum* as surplusage, and why should we not do it as well as where a man's name is mistaken; it may be called a variance, but I think it is a very immaterial one after the merits are tried. Perhaps it might have been bad if the defendant had demurred to it, but I am much inclined to think it well enough upon a writ of error after a verdict.

To be spoken to again.

But I suppose it was never spoken to again, the plaintiff in error seeing the court incline against him.

Ouston

Ouston *versus* Hebden. B. R. In Prohibition.

RULE to shew cause why a prohibition should not go to the court of Admiralty; the defendant *Hebden* being a part-owner of the ship *Scarbro*, procured a warrant from the Admiralty and arrested her in port.

Prohibition. Where there are several part-owners of a ship, the owners of the less shares may arrest the ship in the Admiralty, and compel a security to be given by the others before they shall be permitted to navigate out o' port.

The suggestion for a prohibition sets forth the proceedings in the Admiralty, states the libel, which is, that this ship was built at *Scarbro*, that the builder sold one third part of her in sixteen parts, retaining the other two thirds of her to himself, that the whole ship is worth about 500*l.* that the builder mortgaged his two thirds, and died, and that his widow and representative sold the same absolutely to *Ouston*, who is now the master as well as owner of two thirds; that this sale to *Ouston* was made without the consent of the other part-owners, and without any security given to them by *Ouston*; that he being master and chief part-owner, insisted upon going a voyage against the will of the other part-owners; that he refused to pay them for their shares, (they desiring not to continue any longer part-owners with him) or to sell the ship and distribute the money among them in proportion; and then the libel concludes praying the ship may be sold, or that they may have such other remedy as may be thought proper by the Admiralty.

Ouston in his answer to the libel says, that *Hebden's* share is not worth more than 50*l.* that the other parts are worth 450*l.* that the other part-owners agreed to his (*Ouston's*) purchase, and did not insist upon his giving security before the institution of the suit in the Admiralty; and then he says, that there is no such usage as set forth in the libel for the court of Admiralty to sell the ship, and says that he insisted the ship should go the voyage, and it is suggested for a prohibition that the Admiral has no jurisdiction in port.

Doctor *Strahan* against a prohibition: The suit in the Admiralty is instituted against the ship and not the person, and it is clear the Admiral has jurisdiction in this case from many authorities; from the laws of *Oleron* made in that island by *Richard 1.* when he came from the holy land, *Pryn.* 121. and he cited *stat. 4 Ann. c. 16.* as to seaman's wages; and several orders of council, *viz.* of 14 December 1644. and in March 1665. and an agreement between all the Judges of *England* and the Judge of the Admiralty of 18 February 1632. which was confirmed by the King in council, and ordered to be registered among their orders, a copy whereof is in *Pryn.*

Serjeant *Bootle* of the same side: The defendant being a part-owner is in the nature of a tenant in common, and there is no remedy for one tenant in common against another at common law for disposing of the whole ship, and so is 1 *Lev.* 29. *Lit. sec.* 323. *T. Raym.* 15. And where there is no remedy at law, this court will not grant a prohibition to the Admiralty. *Vide* 1 *Roll. Abr.* 530. *C. pl.* 3. 1 *Ld. Raym.* 223. *Fitzgib.* 192.

Poole of the same side: This is not a common law question touching property, for the respective shares of the owners are admitted upon the face of the pleadings, but the question is concerning the exercise of property, and as this is a matter for which no remedy can be had at common law, this court will not grant a prohibition; courts of law can issue no process to prohibit waste, and do not take cognizance thereof until after it is done. To shew this suit is properly instituted, *Skin.* 230. And there is no want of jurisdiction, nor of a proper trial in the Admiralty, and the suit there is *in rem*, and not *in personam*.

Sir *Thomas Bootle* for a prohibition: This whole transaction appears to be at *Scarbrô*, from whence the *pais* may come and it is universally laid down in our books, that the Admiralty has no jurisdiction of matters done at land, whether here, or beyond sea, and if a contract be agreed upon at sea, and sealed and finished at land, it is the same as if the whole had been made at land they pray to have the ship sold, the most that can be done is only to oblige *Oufston* to give security.

Lee Ch. Justice: Are you willing to give security?

Sir *T. Bootle*: We must take it as it appears upon the libel, which contains more than the Admiralty has jurisdiction of, *viz.* it prays a sale of the ship; the cases cited by the Doctor only shew that the Admiralty has jurisdiction concerning the laying of ships in port, and injuries done to one another in port, by laying too near, &c. seaman's wages, &c. but even in cases of wages, if they are not in the common way, but by special contract at land, the Admiralty has no jurisdiction. As to the orders of council, this court never did nor ever will take notice of them, they are of no authority at all to a court or a jury, and I hope never will reach the jurisdiction of this court; and as to the agreement between the Judges and the Admiralty, that is of no authority at all. It is objected that a part-owner has no remedy at law against another, in answer, *Carth.* 26. Lord *Holt* was clear of opinion that one part-owner may have a special action against another for hindring him to go out with the ship. *Vide* 1 *Ld. Raym.* 223.

Mr.

Mr. *A. Fawkes* of the same side: The original jurisdiction of the Admiralty is either by the connivance or permission of the common law courts; the *stat.* of *Ric.* 2. and *H.* 4. are only in affirmance of the common law, and to prevent the great power the Admiralty had got by the laws of *Oleron*; and the true reason for their jurisdiction in matters done at sea, is because no jury can come from thence, for if the matter arise in any place from whence the *pais* can come, the common law will not suffer the subject to be drawn *ad aliud examen*; and this is the true touchstone to try whether the Admiralty has jurisdiction. 12 *Rep.* 129. *Roll. Abr.* 531. *Owen* 122. *Brownl.* 37. 2 *Ro. Rep.* 413. It appears *Hebden*, at *Scarbrô*, before a notary public protested against *Ouston*, or any other person's navigating the ship out of the port of *Scarbrô*, by the 4th article of the libel; from whence the *pais* may come; and in cases between man and man the Admiralty has no jurisdiction. *Cro. Jac.* . *Moore*, 891. 2 *Rep.* 49. *Mo.* 916.

Whether the court of Admiralty can compel security to be given in this case has been *vexata questio*, and that they cannot, see *Hard.* 473. *Carth.* 26. 6 *Mod.* 162. Though the Admiralty has no jurisdiction, yet a remedy may be had in the Hall; for in the case of *Cobb* and *Masters* in Chancery, before Mr. Justice *Parker*, who sat for the Chancellor, it was decreed that the greater part-owners should not navigate the ship until security given to the others; Mr. *Hume* and Mr. *Lawson* were both of counsel in that cause; but suppose the Admiralty has a jurisdiction to compel a security, yet there is no such thing prayed in the libel, which is only to sell the ship; and I humbly insist there is no court whatever can compel any man to part with his property against his will.

Lee Chief Justice: Generally speaking, the court of Admiralty has no jurisdiction of matters or contracts done or made at land; but this particular case must be determined upon the whole case as it appears upon the pleadings; now the libel concludes with praying that the ship may be sold, &c. Or that the party libelling may have such other remedy as that court shall think proper; I have no doubt but the Admiralty has a power in this case to compel a security, for this is a proceeding *in rem*, and not *in personam*; and this jurisdiction has been allowed to that court for the public good, as is confirmed by the case cited from *Fitzgib.* where it is said that courts of law have allowed it. Indeed the Admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling or compelling the party to sell, or to buy the shares of the others, which was agreed to, *per totam curiam*, and the rule as to that was made absolute; but as to compelling a security to be given the rule was discharged.

Johnson

Johnson *versus* Bridgewater. B. R.

A small mistake in the title of the declaration not a reason to set aside the judgment, and the roll may be right.

THE bill of *Middlesex* was returnable on *Friday* next after the morrow of the holy *Trinity*; the plaintiff's attorney delivered a declaration to the defendant's attorney, intitled of *Trinity* term in the 19th year of King *Geo. 2.* which the defendant's attorney at the same time told him was wrong, and ought to be *Trinity* term in the 18th and 19th years of the King, (for the effoin-day was in the 18th year, and all the rest of the term in the 19th) and desired him to make it right, which he refused to do, and proceeded to judgment for want of a plea; and now *Ford* moved to set aside the judgment, insisting that there was no such term as *Trinity* term in the 19th year, and said the like thing happened about the 7th year of the present King; and Lord *Hardwicke* said it ought to be styled *Trinity* term in the 7th and 8th years of the King. The court agreed it was *Trinity* term the 17th and 18th years of the King, and said if the roll was right it would be well enough; and the Master in court saying that many declarations of this term were intitled in the 19th year, they thought it was too much to set aside the judgment for this small mistake, because it might effect many other cases, and be of great public inconvenience to many plaintiffs; and discharged the rule to shew cause.

Behema *versus* James. B. R.

Copy of process served without the defendant's name to the notice at the bottom is bad.

A Copy of a *latitat* was served upon the defendant without his name to the notice at the bottom of the copy; and it was moved by Mr. *Hussey* to quash the *latitat*, which was done *per tot' cur'*; and they said it had been often so ruled, and that the *stat. 5 Geo. 2.* expressly requires it; *Fawcett* for the plaintiff opposed it strongly.

Smith *versus* Davies. B. R.

A freeholder is refused a rule to inspect the rolls of the manor in a case between himself and the lord touching a copyhold.

THE lord of the manor of *Tootham* in *Suffex* brings this ejectment for lands claiming them as copyhold; the defendant is a freeholder in the manor, and claims the lands in question as freehold; and the defendant moved for a rule to inspect the court rolls of the manor; but it was refused *per curiam*, and they said such a rule was never heard of; the plaintiff is not obliged to assist the defendant to make out his title; and *Lee* Chief Justice said that churchwardens, in a case lately, were refused to inspect parish books, where they themselves were parties.

Michaelmas Term

I Geo. 2. 1745

Gulliver *versus* Wickett. B. R.

THIS was an ejectment, upon the trial whereof this case was made for the opinion of the court.

Robert Waitb being seised of lands in fee, by his will of the 8th of December 1686. devised the whole to his wife *Katharine* for her life, and after her death to such child as she was then supposed to be enseint with, and to the heirs of such child for ever, provided that if such child as shall happen to be born shall die before the age of twenty-one years leaving no issue of its body, the reversion of one third of the said lands should go to his wife and her heirs; one third to his sister *Elizabeth* and her heirs, and the other third to his sister *Ann* and her heirs.

1. Will. 250
2. 15x C 105. 10th 6/191

Devise to a child in ventre sa mere, where the child never was in existence.

And what are words of condition and what of limitation, and what is a good executory devise.

The testator died soon afterwards, leaving his wife who was not with child, nor ever had one, and three sisters, *Elizabeth*, *Ann* and *Mary* his heirs at law, to the last of whom he only gave a legacy of five pounds; the lessor of the plaintiff claims under the wife and two sisters *Elizabeth* and *Ann*, and the defendant claims under the other sister *Mary*.

The principal question for the consideration of the court is, whether the devise over to *Katharine*, *Elizabeth* and *Ann* be a good devise or not; for if it is good, then judgment must be for the plaintiff, if not good, then one third descended to *Mary*, and it will be for the defendant.

This case was solemnly argued by Mr. *Commyns* for the plaintiff, and Serjeant *Skinner* for the defendant, *Hil.* 17 Geo. 2. and by Mr. *Ford* for the plaintiff, and *Booth* for the defendant, *Trin.* 18 & 19 Geo. 2. and in this term, *Lee* Chief Justice delivered the opinion of the whole court for the plaintiff.

PART I.

E c

Lee

Lee Chief Justice: The intention of the testator upon the face of this will is very plain and clear, and therefore it ought to be fulfilled if by law it can; the devise to *Katharine* for life, with remainder to such child as my wife is *enseint* with in fee, we are of opinion is a good contingent remainder to a supposed child *in ventre sa mere*; and if there had been no devise to the wife for life, the devise to the child *in ventre sa mere*, being *in futuro*, would have been a good executory devise; but as in the present case the devise to the child *in ventre sa mere*, is after a freehold to the wife, it is certainly a good contingent remainder. *Salk.* 229. *Cro. Jac.* 590. 2 *Saunders* 388. *Bridgman* 3. The devise being to the child and its heirs, if the will had stopped there it would have been an absolute fee, but the proviso which follows has contracted it, and made it a fee-simple conditional.

411. 2p214

Went, 202.
Salk. 570.

But it is objected that the proviso is a condition precedent, and that the birth of a child is a condition precedent, but we are of opinion that the devise to the child is a limitation of a remainder. 1 *Vern.* 304. *Pollex.* 72. 3 *Keb.* 122. 2 *Lev.* 21. 1 *Vent.* 229. *Page* and *Hayward*, *Trin.* 4 *Annae*; and by *Holt* C. Justice, the word condition is to be considered as a limitation whereby it appears that it may be considered as a limitation either where the devise is in tail or in fee.

Then it is further objected, that though it is now settled that a devise to a child *in ventre sa mere* may be good *ab initio*, and take effect when such child comes into life, yet where it appears afterwards that no such child ever was in *rerum natura*, the devise becomes void *ex post facto*; but in answer to this it must be observed that no case has been cited to support this, nor is there any reason for this difference, for we are of opinion that whether the limitation to the child never took effect, or whether it did, and was determined, is the same thing, as appears by the cases cited 1 *Leon.* 197. 2 *Leon.* as the remainder to the child never could take place, the next devise over must take effect, *Dyer* 300. 2 *Vern.* 723. for taking the proviso to be a limitation, and not a condition precedent, these cases amount to a full answer; and therefore we are all of opinion,

That the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child in contingency in fee with a devise over, * which we hold a good executory devise, as it is to commence within 21 years after a life in being; and if the contingency of a child never happened, then the last * remainder to take effect upon the death of the wife, and the number of contin-

*N. The Ch. Justice sometimes called this devise over executory, and sometimes he

called it a remainder (in delivering the opinion of the court,) so that it seems to me uncertain whether they determined it an executory devise or a contingent remainder.

gencies

gencies are not material, if they are all to happen within a life in being, or a reasonable time afterwards. Judgment for the plaintiff.

Andrews v. Fulham, Trin. 11 Geo. 2. B. R. The same question was determined with regard to leasehold lands to be a good remainder in thirds; and in *Hil. 1742.* in *C. B.* three judges in court; the same case between *Roe* and *Wickett*, held, that the devise over was a remainder depending upon a contingency which never happened, and therefore never could take effect; cited *per* Serjeant *Skinner arguendo*; *contra* the present determination.

Ld. Willer: Chap. 303

The Mayor, &c. of Northampton *versus* Ward. B. R.

621331

9/11/895.114

THIS is trespass for breaking and entring the plaintiff's close called the *Butcher-row* in the town of *Northampton*, and erecting a stall there for a certain space of time; the defendant by leave of the court pleaded three several pleas; 1st, the general issue to the whole; 2^{dly}, As to breaking and entring the said close, erecting a stall there, and permitting it to remain for the space of twenty hours; he pleads that the said place where the trespass is supposed to be done, is as well called by the name of *A.* as by *Butcher-row*, and lies within the town of *Northampton*, which is a burrough by prescription, and that time out of mind there has been a public market there for buying and selling, &c. And says there has been a custom time out of mind for every butcher, being a freeman of the town, to erect a stall in the said place to expose his flesh to sale without paying for the same, and avers that he is a freeman and a butcher, and justifies entring the said place, (being on a *Saturday*, which was the market day) and erecting a stall for exposing his flesh to sale, as it was lawful for him to do, which he says is the same trespass mentioned in the declaration. 3^{dly}, He pleads that as to placing the stall there, and permitting it to remain 20 hours, that the town of *Northampton* is an antient town, and that the *locus in quo* is within the said town; that there is a public market holden every *Saturday* in the *locus in quo* for selling of butcher's meat, that he therefore entred the same place where the market was kept with his meat, to sell the same, and erected a stall for exposing his meat to sale in the said open market, and laid his meat upon the stall for selling it, which stall he says was necessary for him for the exposing his meat to sale, as it was lawful for him to do, which is the same trespass, &c.

2 Stra. 1238. S. C.

Whoever will have a stall in a market must first have a licence for that purpose from the owner of the soil, or otherwise trespass lies.

2 Ld. Ray. 1509

621331

As to the 2d plea the plaintiff replies with a *protestando*, and traverses the custom.

As

As to the 3d plea, the plaintiff replies with a like *protestando*, admits *Northampton* is an antient town, that the *locus in quo* is within it, and that a market is held there on every *Saturday*, and says that the corporation is seised in fee of the said close in which, &c. and of the said market, and that the defendant, without the licence or consent of the plaintiff, and of his own wrong, entred and erected the stall.

Defendant rejoins to the replication to the 2d plea, and takes issue upon the traverse of the custom.

And to the replication to the 3d plea there was a frivolous rejoinder, and thereupon a demurrer by the plaintiff, who shewed for special cause that it does not appear that the defendant had any legal right to set up a stall in the market, nor had any leave so to do from the plaintiff who is seised both of the soil and market.

So that there were two issues joined to the country, *viz.* upon the Not guilty, and the custom, which went down to be tried, and a verdict was found for the plaintiff against the custom, and also for the plaintiff upon the Not guilty.

But as by law the defendant with leave may plead as many pleas as he thinks fit, and if any of them be a good legal defence for him he must succeed against the plaintiff, or if none of the pleas be good, yet if plaintiff has mistaken his action, he cannot have judgment against the defendant; therefore the defendant by his third plea having insisted that he had not only a right to come into the market, but also to set up a stall there, it being a public market, the plaintiff's replication was not a good answer to it, as he insists, and therefore the demurrer was argued three times at the bar, *viz.* In *Mich.* term 18 Geo. 2. by *Luke Robinson* for the plaintiff, and Serjeant *Draper* for the defendant; In *Hilary* term 18 Geo. 2. by Mr. *Starkey*, Postman of the Exchequer for the plaintiff, and *Willes* the King's Serjeant for the defendant, and in *Trinity* term last by Sir *John Strange* for the plaintiff, and Mr. *Gundry* for the defendant. I heard and noted all the three arguments, the substance of all of them being contained in the last, I shall only set *that* down here.

Sir *John Strange* for the plaintiff: There are two principal questions arise in this case.

1. Whether of common right every person in *England* may come into a public market and erect a stall there.

1

2. If

2. If he cannot do it, (which I shall endeavour to shew he cannot) whether an action of trespass is not a proper action in this case for the plaintiffs as owners of the soil?

Stallage and *piccage* are so well known in the law that they want no definition; but if it be of common-right to erect a stall in a market, there is an end of them both; the common right that has ever been contended for, as to a *market*, has never been carried further than the coming into the *market* to expose goods to sale; if any one so coming will have a *stall*, he must pay for it, which is *stallage*, and if he breaks the *soil* it is *piccage*. The right to a *market*, and right to the *soil*, are very different things, and one may belong to one man, and the other to another, and *stallage* and *piccage* are incident to the *soil*; therefore if the King grant a *fair* or *market* with *toll* certain, to one and his heirs to be held within land that is *borough english*, and the grantee dies, the heir at the common law shall have the *fair* or *market*, and the *toll*; but the youngest son shall have the *piccage* and *stallage* with the *soil*, by the custom. *Mo.* 474.

Piccage and *stallage* are very different from *toll*, for *toll* is certain, is payable by the buyer, and not unless there is a sale, and must be by grant or prescription; but *piccage* and *stallage* are uncertain, payable whether the goods on the stall be sold or not, and are due of common right to the owner of the *soil*, even where a new market is held or kept; and therefore as I insist the *soil* is no further appropriated to the use of the public, when a market is held thereon, than for liberty to any man to enter the market to buy and sell there, any person who wants an easement, (as a *stall* is,) must agree with the owner of the *soil* for licence to erect one, and if he erects one without such leave, he is a trespasser. 2 Inst. 220.

It appears upon this record that the plaintiffs are the owners of the *soil*, that the defendant erected a *stall* thereon without their licence, for it must be taken he had no licence, he not having pleaded any; but however, it is averred in the replication that the defendant did it of his own wrong.

If a man cannot fix a *stall* in a *market* of common right, it follows he must make some composition with the owner of the *soil* before he can do it; for if a man uses my *soil* without my leave, I may maintain *trespass* against him; and an action of *debt* will not lie, for here is no certain duty or recompence, nor can the plaintiff distrain, because there is no certain demand; case on an *assumpsit*, or *quantum meruit* will not lie, because there is not any *contract*, and these must be grounded upon a promise, either *expressed*, or such as the law will *imply*; and as this was done without the plaintiff's li-

Blount's Law
Dict. Min-
theu, Boyer
verbo Etal-
lage,
Spelm. Glos.

cence, and of the defendant's own wrong, which is confessed by the demurrer, there could be no *contract*; *stallage* is a satisfaction to the owner of the *soil* in a *market*, for the liberty of placing a *stall* upon it, the plaintiff is the owner of the *soil* here, and so has a right to such satisfaction, and there is no right without a remedy; if therefore, neither *debt*, *assumpsit* nor *quantum meruit* will lie in the present case, nor the plaintiff can distrain, (as I have already shewn,) *trespass* must be the only remedy.

I shall now take notice of what was said of the other side upon the former argument. It was said, *1st*, That as the law gives the defendant leave to come into the market to sell his goods, it will also give him every thing necessary for the conveniency of selling and exposing them to sale, and that it appears upon this record that a *stall* was necessary for the defendant in the market.

In answer to *this*, it must be admitted, that every person may come and bring with him to the *market* his goods to sell, but if he wants any conveniences *there*, as a *stall* of less or greater dimensions, he must agree with the owner of the *soil* for it, for if it were otherwise, there would be nothing but strife and confusion, instead of peace in the *market*, and the strongest hand would engross the largest *stall*, and a few persons might take up the greatest part of the space in the *market*, and the owner of the *soil* have no adequate satisfaction; and as to a *stall* being absolutely necessary for a butcher, he may have his meat carried about the *market* in baskets, which would be as convenient to the public as if he had a stall, which can only be for his own single conveniency or easement

The case of the fix carpenters, 8 *Rep.* was cited for the defendant, but is an authority for the plaintiff, for it proves that where one enters the freehold of another under a licence or legal authority, and afterwards abuses that licence or authority, he thereby becomes a trespasser *ab initio*; where a man has a right of *common*, and the *soil* happens to be so overflowed that he cannot enjoy it without digging trenches to drain it, yet if he does dig trenches to drain it, the owner of the *soil* may bring *trespass*. 1 *Sid.* 251.

Another objection was, that, *it* being a public *market*, the *soil* was dedicated to the public use; in answer to *this*, I admit that no man can be a trespasser for coming into the market, the *soil* being dedicated for that particular purpose of a *market*; but if a man breaks the *soil* (as has been admitted on the former argument by Serjeant *Willes*) he becomes a trespasser, and so he is (as I insist) if he erects a stall without the licence of the owner of the *soil*. In the case of *Sir John Lade v. Shepherd*, Hil 8 Geo. 2. In an action of *trespass quare clausum fregit*, upon Not guilty a case was made for

for the opinion of the court, which stated, that the *locus in quo*, &c. was formerly the property of the plaintiff, that he, some years ago, built houses and a street upon it, and that part of the said place near the houses had, ever since, been used as an highway; that the defendant was owner of the lands joining to this highway, which was only parted by a ditch; that the defendant laid a plank over this ditch by way of bridge, one end whereof rested upon his own ground, and the other upon the plaintiff's, *which* was now an highway; upon the argument of this case it was very strongly insisted, that the plaintiff having made this an highway, the *soil* was dedicated to the *public*, and he could not now maintain *trespass* for thus laying the end of a plank upon it, (but whether the defendant might be liable to an indictment for it, was another matter); Lord *Hardwicke* and the *whole court* were of opinion, and said, "That although it was certainly a dedication of the *soil* to the use of the *public*, so far as the *public* might have occasion to pass and repass along this street or highway, yet that the plaintiff had not absolutely parted with the property of the *soil*, and to all other purposes, except the right of passage to the *public*, it is still the plaintiff's *soil*, and this was an *easement* to the defendant, and if he will have it he must agree with the plaintiff for it;" and *per totam curiam*, "Trespass well lies, and judgment was given for the plaintiff". This is the case of the owner of the soil; but in 2 *Rol. Abr.* 549. *H. p.* 1. he that has only the herbage of a forest or close may have trespass, as well as he who hath the land. Every man must keep himself within his own privileges, for if a man bring his cattle upon the common with an intent to agree for them there, and having driven them thither, finds the common not yet fit, he becomes thereby a trespasser notwithstanding he drives the cattle away again immediately, and although he might lawfully go himself to see if the common was fitting. 1 *Rol. Abr.* 406. *pl.* 7.

It was also objected, that if the defendant cannot set up a *stall*, it will be putting it in the plaintiff's power to deprive him of the benefit of the *market*, which every man in *England* has a right to come into, to sell his goods, and *this* would be a public inconvenience. In answer to *this* I would mention the case of coal-mines in the north, where if the owner of the mines wants to have a way over his neighbour's grounds (though coal-mines be for the public benefit) yet he must agree for it with *him* over whose ground he would pass, though it be never so poor and barren; the owners of coal-mines have often made attempts, (some in parliament,) to break through these *way-leaves*, but they never could prevail; for it is but reasonable, if my neighbour happens to find coals close by my lands, which makes his estate of twenty times the value it was before, if he will have a way over my ground, which is of infinite benefit to him, that I should have some recompence; for though
my

my ground may not be worth *2d. per ann.* before to myself, yet to my neighbour, it may be worth *1000 l. per ann.* and if he will come over it without my licence, my only remedy is *trespass*.

Du Fresne's definition of a stall was mentioned before by Serjeant *Willes*, that it was a station or place, &c. and that though a man might come to a *market*, yet if he could not have a *station* or place to put his wares upon, he might as well not have the liberty of coming into it at all; to this, I admit he may have a *station*, with a *basket*, or such a thing, but if he will have a *stall*, and take up a greater space of ground, he must pay the owner of the *soil* for it. It was also objected, that the plaintiff ought to have made a demand of a sum of the defendant for *stallage*, before he could maintain *trespass* in this particular case; in answer, I submit that it might as well be said that in every case of a *trespass* a satisfaction must be demanded while the party is doing the *trespass*; so he concluded for the plaintiff.

Argument for
the defendant

Mr. *Gundry* for the defendant: The defendant has averred that a *stall* was necessary for him for exposing his goods to sale, and this, by the demurrer, is confessed; it is admitted I have a right to come into the *market* and bring my goods in order to sell them, and by the pleadings that a *stall* is necessary; but it is said, no man is obliged to find or provide me a *stall*, therefore I insist I have a right to erect a *stall* myself. I shall endeavour to answer Sir *John*, and shew,

1st, That *stallage* is not due of common right; and

2^{dly}, That *trespass* in this case is not the proper remedy.

In order to the 1st, I shall give some account of the origin of fairs, and of the nature of *toll*, *piccage* and *stallage*.

Fairs and *markets* are derived from the crown, and must be by grant or prescription; the *public* have an interest therein, and that is the reason why no man can have *either*, without licence from the King; and it is no uncommon thing in the law, for a person to have a franchise, and yet be only considered as a mere trustee for the *public*; as in the case of a corporation, the grant to the *mayor* may be for the benefit of the whole town; *markets* were originally granted to towns for the *public good*, therefore the *public good* is chiefly to be considered. In former times the greatest part of the property of this kingdom was in a few great men, lords of manors, cities and antient towns, and it was for the lord's benefit for people to resort to his manor, to take off and buy the produce of his lands; and for the benefit of towns, to have people come to their markets, to supply them with such necessaries as they daily wanted.

I can-

I cannot find one judicial determination in all the books, that stallage is due of common right; that it may be due by grant or prescription, I admit; but there is a great difference between what may be due, and what is necessarily due; it would be more reasonable to say that toll is due of common right (which no body can say it is) than that stallage is, for he that has toll is obliged to keep books, and to do other things; in 1 *Lutw.* 1518. stallage is considered as a kind of toll; and as to the case in *Moor*, of the two brothers, where the market goes to the eldest, and the soil (being *borough english*) to the youngest, it does not follow from that, that stallage is due of common right. If it be payable at all it must be by custom; see Dr. Kennet's *paroch. antiq. Glossar. verb. Stallagium*, that stallage is a *customary* rent paid in fairs and markets for the liberty of a stall or standing; and though it may sometimes be incident to a market, or fair, yet it is separable; and *Hen* 2. granted to the tenants and merchants within the honour of *Wallingford*, *ut quieti sint de Tbelonio, Stallagio, &c.* As to the 2d point, that the defendant is not a trespasser:

2 Inst. 270.
2 Ro. Abr.
123.

Supposing (for argument's sake only) that stallage be due as necessarily incident to the owner of the soil where a market is kept, it must be a certain duty, and not arbitrary, therefore debt will lie for it, or the owner may distrain; and let the right to some duty be but fixed; it must be recoverable upon a *quantum meruit*, which of late years hath been substituted in the place of that action which was formerly called a special action of debt, as it is called in the case of the six carpenters, 8 *Rep.* 147. for the law to say there is something due to the lord, and that there is no way to recover it, is a mere *jus vagum*; trespass is to recover damages for a tort, if any sum of money be due, *this* cannot be the proper action.

It is admitted that every man has a right to come into a market with his goods to sell, and defendant has pleaded that a stall is necessary, which by the demurrer is also admitted, therefore it follows that every man has a right to erect a stall, if this were not true, it would be in the power of the owner of the soil, let the market be in whom you will (and it may be in another person, as in the case in *Moor*) to defeat the owner of the market of his profits thereof, by demanding such unreasonable sums for stallage, as would prevent every body from coming to market who had any large quantity of goods to sell, or he might admit and exclude whom he pleased, and it might be worth the while of one person to give the lord a sum to exclude all others of the same trade, which would be quite contrary to the nature of the grant of a market, which is for the public good.

As the law gives a right to every man to come to market to sell his goods, it will also give him the means of enjoying the end of his coming there; in all cases where a man releases the means of coming at any thing, he releases the thing itself; as if a man brings an action upon a bond, and then releases all actions, he thereby releases the bond. It is said we must ask leave, that is saying we have no right of coming into the market at all. If a grant be to a Duke, to hunt, it extends to proper attendants upon him; the like points in 9 Rep. 46. 1 Sid. 430. *Bro Incidents*, p. 8. 6 Mod. 149.

If the owner of the soil should take unreasonable stallage, inso-much that if he were owner of the market it would be a forfeiture thereof; yet if the soil and market were in several persons, an *abuser* in the owner of the soil would not be a forfeiture of the market. A grant to hold a market in another man's soil would be void; the words piccage and stallage as well as toll are used in all antient grants of markets. In the case of an highway through the ground of the lord of a manor, the lord might as well say that toll is incident for going through it, as in this case of a public market; if in the case of Sir John Lade, (before cited) a bridge had appeared to have been necessary, the law would have allowed it; if there is any duty certain or uncertain, it is impossible to recover for it in trespass; and there seems to be no difference between this case, and *that*, where if a man does not pay toll, which is a certain sum, he is not a trespasser; *Wigley v. Peachy*, *Ld. Raym.* 1589. this question has been under the consideration of this court before in *Pass. 6. and Hil. 7 Geo. 2* *Quantum meruit* for stallage, the like for toll, and another count for toll and stallage, it was objected that an action of *assumpsit* would not lie; the court doubted as to toll and stallage in the same count, because toll is certain, and stallage uncertain, but agreed that a *quantum meruit* would well lie for stallage; concluded for the defendant.

Judgment of
the court.

November 15, in this term; *Lee* Chief Justice delivered the opinion of the whole court, and gave judgment for the plaintiff. And 1st, It was resolved, that, by law, every man has, of common right, a liberty of coming into any public market to buy and sell, without paying any toll, if it not due by custom or prescription; but if he requires any particular easement or convenience, as a stall in the market, he must have the licence of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage; if there be a fixed sum or duty by custom, *that* cannot be exceeded, but still he must agree with the owner of the Soil. *Spel. Gloss. verb. Stallangiator, i. e. Qui stationem (quod stallum & botham vocant) in foris habet, vel nundinis mercium vendandandarum gratiâ—Quilibet stallangiator vel faciat finem cum*
4 *præposito*

præposito (burgi) secundum quod cum eo convenire poterit, vel dabit obolum quolibet die feri; from hence, and the case in 1 *Ld. Raym.* 149. it is clear the defendant had no right of erecting a stall without making a satisfaction for it to the owner of the soil, and this is properly called stallage; if the pavement or soil be picked or dug up or broke, then it is piccage; and stallage shall go with the soil to the youngest son where it is *borough english*, though the market shall descend to the heir at common law. *Moor* 474. Toll can only be due by grant, custom or prescription; and it was said at the bar that stallage was a toll, and so called in some books, as in *Lutw.* 1518. but then it is a toll *sui generis*, and the owner of the soil is of common right intitled to stallage in a new erected market, and the soil is no farther appropriated to the public use than that every man has a legal right to enter into the market to buy and sell. *Palm.* 82. 2 *Inst.* 220, 221. 1 *Ld. Raym.* 149. The Ch. Justice said a market might not improperly be compared to a parish church, whither all the parishioners have a right to go to hear divine service, but have not liberty to furnish themselves with pews without the appointment of the ordinary; and the reason of the law being so, is for avoiding confusion and disorder in public meetings and assemblies; and that no case had been cited, nor could he find any in the books, to shew that a man, coming to a market, had a right to erect a stall without licence from the owner of the soil.

Secondly, it was resolved, that trespass was the proper action in the present case, and that neither debt nor *assumpsit* would lie, nor could the owner of the soil distrain, because there is not any certain fixed sum or duty, or contract express or implied; this is not a nonfeasance but a misfeasance, and is something like the case of the six carpenters, where if a person enters lawfully, and afterwards misbehaves, he becomes a trespasser *ab initio*. 8 *Rep.* 146. 2 *Roll. Abr.* 561. G. 1. Judgment for the plaintiff.

Alcorn Executor Westbrook. B. R.

3 Brd. 411

SPECIAL action upon the case; the declaration sets forth, that whereas the plaintiff's testator *Manby* delivered to the defendant a certain writing obligatory, whereby one Lord Viscount *Gave* became bound to him in 300 *l.* &c. he the defendant, upon payment of 22 *l.* by the said *Manby* to him, promised to re-deliver the said bond to *Manby* upon request; and that the defendant, notwithstanding he was requested, did not deliver the bond to the said *Manby* in his life-time, nor to the plaintiff since his death, to the plaintiff's damage. The defendant pleads *non assumpsit*, and upon
 Special action upon the case upon a promise to deliver up a bond pledged upon payment of money borrowed of the defendant. Breach assigned that defendant refused to deliver up the bond, and held well enough, although it is not said that the money was paid or tendered, it having been proved at the trial that the money was tendered and refused.

the

Variance between the count and evidence in respect to the name of a person, helped.

the trial at *Guildball* before *Lee* Ch. Justice, the evidence to support the plaintiff's case was, that *Manby* deposited this bond in the hands of the defendant as a pledge or security for the payment of 22 *l.* (together with another security) that *Manby* tendered the 22 *l.* to the defendant, and demanded the bond of him, which he refused to deliver; and it was objected for the defendant at the trial that the evidence doth not agree with the plaintiff's case, for it is not laid in the declaration that *Manby* either paid the 22 *l.* to the defendant, or tendered the money to him, and he refused it; and 2dly, That the bond is not rightly described in the declaration, for *there* it is Lord Viscount *Gave*, whereas the bond deposited and proved to be demanded was entred into by *Ld. V. Gage*.

Evidence.

If the substance of an issue be proved it is sufficient.

9. wh^{ch} such Plea is to be good in Law.

This was made a case for the opinion of the court, and was argued by Sir *John Strange* for the plaintiff: 1st, That the evidence given sufficiently proved the plaintiff's case; and he cited *Price v. Brown* at *Guildball*, before Lord *Raymond*, after *Hilary* term 12 *Geo. 1.* which was debt on a bond conditioned for the payment of money at a future day; the defendant pleaded that after the day and before the bringing the action he paid the principal and all interest due thereon; the plaintiff replied, that he had not paid off all the principal and interest, and thereupon issue was joined; and it came out in evidence that he had not paid the whole, there having been a small mistake in calculating the interest; but it was at the same time proved that the defendant paid a sum in gross, which was accepted by the plaintiff in full satisfaction of all principal and interest due upon the bond; and though it was objected that the defendant ought to have pleaded according to the truth of his case, *viz.* That he paid a gross sum which the plaintiff had accepted in satisfaction, yet my Lord *Raymond* over-ruled the objection, and said the substance of the issue was with the defendant, and he had proved his plea sufficiently.

As to the 2d objection that it was *Gave* in the declaration instead of *Gage*, he argued that it was only surplusage, and might be rejected, and it is *Gage* afterwards throughout, and the bond will be well enough set out if this word *Gave* be left out; the date of a bond need not be set out in trover for it. *Cro. Car.* 262.

Mr. *Martin* for the defendant, insisted, that the plaintiff had misconceived his action, and that there was no precedent of an *assumpsit* to deliver up a pledge in all the books, but the proper action is *trover* or *detinue* (which latter is now much out of use because of the tedious process as to garnishment); but supposing the present action will lie, it must be supported upon the foot of a special agreement, and it is universally laid down, that every special agreement must be proved in every tittle as it is laid. *Cro. Jac.* 583. 1 *Leam.* 241. 2 *Mad.* 279. 2 *Rol. Abr.* 719. and many other cases.

2dly,

2dly, He insisted that a recovery in the present action upon this declaration cannot be pleaded in bar to another action to be laid properly, according to the truth of the plaintiff's case; and the rule for pleading recoveries in bar is well laid down in Sir Tho. Raym. 472. which is, that wheresoever the same evidence will maintain both the actions, *there* the recovery or judgment in *one* may be pleaded in bar of the *other*, but otherwise not; and a bond given by one *Gave*, is a different bond from that proved, which was by one *Gage*.

Lee Ch. Justice: I give no opinion, but as at present advised think the plaintiff is well intitled to bring this action in the manner he has done, and the evidence is sufficient to support it, that the tender and refusal of the 22*l.* amounts to payment, and *Manby* did all he could. And as to the variation of *Gave* instead of *Gage*; it is *Gage* in the declaration throughout afterward; and I do not see why the word *Gave* may not be rejected.

Wright Justice: I should be willing to go as far as possible to assist the plaintiff, but this is a special action upon the case, which ought to be laid as proved; now upon the evidence it appears that the case laid in the declaration was not the plaintiff's case, but the true case is, that *Manby* borrowed of the defendant 22*l.* and deposited the bond in his hands as a collateral security to be re-delivered upon payment of the 22*l.* and that *Manby* tendered the 22*l.* and defendant refused to accept it and deliver up the bond; now if this case had been laid in the declaration according to the truth, there could have been no doubt but the plaintiff would have been intitled to recover, but the tender and refusal is made no part of the case. And as to the variation, I think it a very material one, and difficult to be got over; however, I desire time to consider, and give no opinion at present.

Dennison Justice: If a man agrees to build for another a house to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement as to be performed *in futuro*, or upon an *indebitat' assumpsit*, or *quantum meruit*, when the house is actually built and the agreement executed. In the present case as the money was tendred and refused I consider it as paid; then the promise to deliver up the bond rises by operation or construction of law; therefore says the plaintiff I do not declare upon the original agreement but upon the promise arising by operation of law; and as to the point of the variation, I think the word *Gave* may be rejected, and there is sufficient evidence to prove the bond described in the declaration is truly the bond in question; and it is well enough after a verdict, however it might have been upon a demurrer, but as there seems to be some doubt in the court I give no opinion.

Foster Justice inclined to be of opinion with the Ch. Justice, and *Dennison* for the plaintiff.

The court took time to consider, and afterwards on the 28th of *November* this term gave judgment for the plaintiff unanimously, that this action is well laid, and the evidence supported the case as laid, and that the word *Gave* was only surplusage. *Savil* 71. *Lutw.* 561. *Postea* ordered to be delivered to the plaintiff.

Hannah Welford, wife of John Welford, by her next friend, *versus* Hannah Beezley the elder, Joseph Beezley and John Welford defendants. In Chancery at the Rolls, December 11, 1745.

A mother who agrees to give her daughter a portion upon her marriage does not execute nor is party to the articles, but only sets her name as a witness, this is a sufficient memorandum in writing to bind her.

HANNAH Welford preferred her bill to have a specific performance of articles made upon her marriage with the defendant John Welford, setting forth that in 1730. a treaty of marriage was had between the plaintiff and John Welford; and after divers meetings thereupon by all the parties, Hannah Bezeley the defendant, and mother of the plaintiff, in consideration of the intended marriage agreed to give 1000*l.* as a marriage portion with the plaintiff to be laid out as set forth in the articles; and thereupon an indenture tripartite dated the 18th of July 1730. was made and executed with the privity and consent of the plaintiff's mother) between John Welford of the first part, the plaintiff of the second part, and Joseph Bezeley of the third part, reciting that the marriage was then agreed shortly to be had between John Welford and the plaintiff, and that Hannah Bezeley the mother had agreed to advance and pay 1000*l.* to be laid out in stock, as a portion for the plaintiff, to the uses therein mentioned in the name of Joseph Bezeley, that is to say, to the use of the plaintiff for her life, notwithstanding her coverture, and after her death in case the marriage took effect, then to her husband, his executors and administrators; which deed was executed by the plaintiff her husband, and Joseph Bezeley the trustee, but not by the mother, nor was she a party thereto, but was present at the execution, and signed her name as a witness to the same.

The mother by her answer admits the treaty of marriage, and says, that John Welford was represented to be in good circumstances, and in consideration thereof she agreed to give 1000*l.* for the plaintiff's portion to be settled on her, and that this was all the agreement, that was before the marriage; she denies that the articles were made with her approbation, and says that at the time of the execution thereof she declared her dislike to the match, and was unwarily drawn in to set her name as a witness.

The

The plaintiff proved that the mother before the marriage declared she would give the plaintiff 1000*l.* with *John Welford* as a portion, and that the articles were read over at the time of the execution thereof in the mother's presence and hearing, and that she wrote her name as a witness thereunto.

The Master of the Rolls : I am very clear that the articles ought to be carried into execution, and that although the mother did not execute them as a deed, yet surely her setting her name as a witness thereto is some memorandum in writing, and sufficiently takes this case out of the statute of frauds ; the portion was decreed to be placed out accordingly, with interest from the marriage until this time ; and his Honour said, that if the mother had already paid the money to the husband and he had spent it, yet she should be obliged to pay it again, and must take her remedy against him. *Brown, Clarke, Wilbrabam and Wilson* for the plaintiff, *Floyer, Noell and Bicknell* for the defendants.

Hilary Term

19 Geo. 2. 1745.

Williams versus Wills. B. R.

THE defendant was arrested by virtue of a *latitat* at the plaintiff's suit, and being thereupon in custody of the sheriff of *Devonshire*, plaintiff declared against him in case upon several promises, complaining against him the defendant being in custody of the sheriff of *Devonshire*, by virtue of a writ of *latitat* issuing out of the court of the Lord the King before the king himself, without saying at whose suit he was so in custody ; there was a general demurrer, and it was objected by *Agar* Serjeant, that the declaration was bad, not saying at whose suit the defendant was in custody of the sheriff of *Devon* ; *Ford* for the plaintiff answered, that the objection went to the jurisdiction of the court, so came too late after an imparlance, and could not be taken upon a general demurrer.

In a declaration against a prisoner in custody of the sheriff it must be alledged at whose suit he is detained pursuant to stat. 4 & 5 W. & M. c. 21.

Lee

Lee Chief Justice: Before the *stat. 4 & 5 W. & M. c. 21.* there could be no declaration in this court against a defendant in the custody of a sheriff, and the practice was to bring an *habeas corpus*, and so turn him over to the marshal, and then to declare against him; therefore, to prevent that expense this act was made, and particularly enacts, that it shall be alledged in the declaration in what sheriff's custody the defendant is, and at whose suit.

As to the case of *Morris* and *Watkins*, *Ld. Raym.* 1362. I have a note of it which I have looked into; *That* was debt upon a bond, the court upon the same objection as is made at present upon a general demurrer, held that it must be alledged in the declaration at whose suit the defendant was in custody, as it was before held ill. *Hil. 8 Geo. 1.* in the case of *Stanton* and *Byerly*, where the declaration (as in the present case,) was in *assumpsit* on promises, because not alledged therein at whose suit defendant was in custody; and the court adhered to this; but where it was in an action of debt, as the words of the declaration were *de placito quod reddat ei* so much money, that was construed to mean at the plaintiff's suit, the plaintiff complaining by his declaration that the defendant was in custody of the sheriff of *A.* in a plea that he render to *him*, which was as much as to say he was in custody at the plaintiff's suit; therefore as the statute has chalked out this particular manner of declaring against a prisoner, it cannot be deviated from. Judgment for the defendant *per totam curiam.*

Cressley versus Kell and others. B. R.

Special bail shall not be required in debt upon a judgment in trespass tho' above 10*l.* damages.

TRESPASS, assault and battery; judgment by default, and upon the writ of inquiry 20*l.* damages were assessed and ten pounds costs taxed; the defendant brought a writ of error, and while that was pending the plaintiff brought an action upon the judgment, and made an affidavit that 30*l.* was due to him thereupon, and held the defendant to special bail, who now moved by *Lawson* that common bail might be only taken; *Morton* for the plaintiff insisted that this judgment was a record of a debt.

But *per Dennison* and *Foster* Justices only in court, where a judgment is not for an original debt or sum due above 10*l.* the court will not hold defendant to special bail, and the defendant was discharged upon common bail, and declared they were for discouraging these actions on judgments, and that proceedings in this suit ought to stay while the writ of error is depending.

Rex *versus* The Inhabitants of the parish of Bray. B. R.

JOSEPH Gold came with his wife by certificate from the parish of *Shottesbrook* to the parish of *Bray*, and there had a son born who lived there until he was 20 years old, and then hired himself to, and served a master a year in *Bray*, and had not gained any other settlement in *Bray*. *James* the son became chargeable, and by order of two justices was removed to *Shottesbrook*; *Shottesbrook* appealed, and the sessions quashed the order of the two justices, and sent the pauper back to *Bray*; and now upon considering the *stat. 9 & 10. W. 3. c. 11.* which enacts, that no person or persons who come in by certificate shall be adjudged to gain a settlement by any act whatsoever, except he rents 10 *l. per ann.* or executes an annual office. The court held that *James* the son of the certificate man was equally within the statute with his father, and that the hiring and service in this case gained him no settlement at *Bray*; so the order of sessions was quashed, and the order of two justices confirmed.

Certificate man has a son born who lives till 20 years old and then serves a year, this gains the son no settlement.

Anonymous. B. R.

A Third person makes affidavit in order to hold defendant to special bail, "That he was indebted to the plaintiff in 800 *l.* as appeared by an account stated and under the defendant's own hand;" Mr. *Henley* moved that common bail might be accepted; and *per curiam*, this affidavit is not sufficient, for the plaintiff may have been paid the debt, and this account may be discharged for any thing the person knows who makes this affidavit, so common bail was ordered. *N.* Such affidavit is bad when it says, "As appears by such a note or bond," &c.

What is an improper affidavit to hold to bail.

Leake *versus* Box. B. R.

3 *may* 1733

DE B T upon a bail-bond assigned to the plaintiff; the defendant demurs, and assigns for cause; 1st, That it is not averred or set forth in the declaration that the indorsement was attested by two credible witnesses; 2^{dly}, That the names of the two witnesses are not set forth in the declaration, and there ought to be a *profert in cur'* of the assignment. Serjeant *Belfield* for the defendant; the names of the two witnesses to the indorsement ought to have been set forth, because the act of parliament directs, that the assignment shall be made by the sheriff under his hand and seal in the presence of two credible witnesses; and it is necessary to set forth the names

Profert not necessary to be made of an assignment of a bail bond, nor the witnesses, names thereto necessary to be set forth in the declaration.

PART I.

I i

of

of the witnesses, because upon *assignavit vel non* if one of the witnesses be infamous, then it is not assigned according to the statute, which says they are to be credible witnesses.

Draper Serjeant for the plaintiff: These two objections have been made and over-ruled twenty years ago, and often determined that there is no occasion to set forth that the indorsement was attested by two credible witnesses, nor to make any *profert* of the assignment, nor to set forth the names of the witnesses; the assignment of a bail-bond is not a deed, so no need of a *profert* thereof, no more than there is to make a *profert* of an award; but if a *profert* was necessary, there is a *profert* made of the bond, the indorsement being upon it is sufficient; the statute does not say that the witnesses shall sign their names as witnesses to the assignment, but only says, that the sheriff shall assign the bond in the presence of two credible witnesses.

Belfield in reply: It is said the assignment is not a deed, but I think it is more than a deed, for by a deed a man cannot assign a *chose in action* legally, but by this the sheriff is enabled to assign a *chose in action*.

Rollison v.
Taylor, Trin.
13 Geo. 1.
S. P.

Wright Justice: It is averred in this declaration that the sheriff of *Southampton* assigned this bail-bond by indorsement upon the said writing obligatory, and attested it under his hand and seal in the presence of two credible witnesses; the same objections were made in *Rollison v. Taylor*, Trin. 13 Geo. 1. where it was shewn for cause of demurrer, that it was not averred that the assignment was attested by two credible witnesses, and that there was no *profert* made of the indorsement; as to the 1st it was answered and resolved, that as it was averred that the assignment was made in the presence of two credible witnesses it was well enough; as to the 2^d, that there being a *profert* of the bond that is a *profert* of the assignment also; but there is another reason, and that is the assignment is not a deed, so no *profert* is necessary; the answer as to the setting forth the names of the witnesses is that the statute does not require it. *Dennison* and *Foster* Justices of the same opinion; and judgment for the plaintiff, the Chief Justice absent.

Harding *versus* Holmes. B. R.

3 mclw 72
Departure.

DEBT upon bond; the defendant demanded *oyer* of the condition, which was for the performance of an award, and pleaded that the arbitrators made no award; the plaintiff replied and shewed an award and the non-performance thereof by defendant in non-payment of 16*l.* 13*s.* awarded to the plaintiff; the defendant

dant rejoined, and said that there were other causes between the parties depending, as a cause of action for 4 *l.* 4 *s.* and another for a gun, and that as the arbitrators had taken no notice thereof it was no award: hereupon the plaintiff demurred, and the defendant joined in demurrer. Now *Ford* for the plaintiff insisted, that the defendant in his rejoinder had departed from his plea, and cited *Sid.* 180. as in the very point. *1 Lutw.* 182. *1 Lev.* 85, 127. *Ray.* 94. The court were inclined to give judgment for the plaintiff, but *Poole* for the defendant prayed it might stand over till next term. *2 Saund.* 188. cited by *Dennison* Justice as in point for the plaintiff. *Adjournatur.* Afterwards in *Trin.* 19 & 20 Geo. 2. *Poole* for the defendant gave it up, and there was judgment for the plaintiff.

Lowfield and Satchwell. B. R.

DE B T upon a bond; the defendant craves *oyer* of the condition, which recites, that whereas *Thomas Taylor* hath sued out and delivered to *R. Westbrook* mayor, and *R. Ladbroke, &c.* sheriffs of *London*, the King's writ to correct the errors in the record of a judgment in one of the city courts, between *Thomas Taylor* and *Ann Lock*: now the condition of this obligation is such, that if the said *Thomas Taylor* shall prosecute his said writ of error with effect, and shall satisfy and pay the said *Ann Lock* the damages and costs, within fourteen days next after the affirming the said judgment, that then the said obligation shall be void, which being read and heard, the defendant pleads that the said *Thomas Taylor* hath prosecuted his said writ of error with effect, and that the said writ of error is still depending, and that the judgment hath not yet been affirmed. The plaintiff replies that after the sealing and delivery of the said writing obligatory at the court of Hustings holden in *Guildhall* in the city of *London*, according to the custom of the said city, on *Monday* next after the feast of *St. John the Baptist*, the said *Ann Lock* appeared, and the said *Thomas Taylor* being solemnly called did not appear; therefore it was considered that the said *Thomas Taylor* should take nothing by his writ, and that the said *Ann* should go without day; the defendant demurred to this replication, and shewed for cause, *1st*, That it does not appear before whom the court of Hustings was holden at the time of giving the judgment, *2dly*, Because it does not appear whether at the time of holding the said court of Hustings the said writ of error was returnable; the plaintiff joined in demurrer; upon the *1st* argument by *Sir John Strange* for the plaintiff, and *Serjeant Draper* for the defendant, the court (*absente Lee Ch. J.*) gave judgment for the plaintiff.

Debt upon a bond to prosecute error in the Hustings, and to pay damages and costs if judgment be affirmed. Plea that the writ was prosecuted with effect, and that the judgment is not yet affirmed. Replication that the writ was nonprossed in the Hustings. Demurrer, and objected that it does not appear before whom the Hustings were held. 2. That it is not shewn that the writ is returnable.

Wright

Wright Justice: As to the 1st objection, it is set forth that at the court of Hustings holden at *Guildball* on such a day according to the custom of the city, &c. which is well enough, and is agreeable to all the entries. *Rast. Ent* 303. a. 334. b.

In answer to the 2^d objection: The defendant in his plea says that he hath prosecuted the writ with effect, and that it is now depending, which shews that it is returnable; but besides this, if it really were not returnable, it cannot be taken advantage of in this action.

Dennison Justice: The condition of the bond is of two things to be done, 1st, To prosecute the writ of error with effect, 2^d, To pay the damages and costs within a certain time if judgment be affirmed; the defendant in his plea says he has prosecuted the writ of error with effect, but to discharge himself, goes on and says that the judgment is not yet affirmed; the plaintiff has replied the record of the court, that at the court of Hustings holden according to the custom of the city, there was a judgment that the plaintiff in error should take nothing by his writ, and that the said *Ann* should go without day *prout patet per recordum*. The objection is, that this court was not properly holden, as being *coram non judice*, but that cannot be made a question here, in an action of debt on a bond; but if it was improperly holden you must bring error in that cause; but it well enough, being alledged to be holden according to the custom of the city. As to the 2^d objection; it would be very strange for us to presume that the writ was not returnable: If the defendant had rejoined *nul tiel record*, we should have seen how the record was, but as the matter now appears to us upon the pleadings we must take it to be right, it being said to be according to the custom of the city. *Foster Justice* of the same opinion.

Pond *versus* King. B. R.

Proceedings
by consent
after the
plaintiff's
death, and the
judgment to
be entred as
in his lifetime.

THIS was an action upon a policy of insurance tried at *Guildball London*, at the sittings after last *Trinity* term, before *Lee Ch. J.* the jury found a special verdict, which is drawn up, but since the beginning of this term the plaintiff died; Sir *John Strange* now moved that a rule might be made by consent of Sir *Richard Lloyd*, counsel of the other side, that to prevent the expence of another trial, whatever judgment the court shall give might be entred as a judgment of the first day of this term, and that no writ of error in fact should be brought, which was ordered accordingly.

The

The King *and* The Justices of Peace of Middlesex. B. R.

SIR *John Strange* moved for a *mandamus* to be directed to the justices of peace of the county of *Middlesex* to swear *Wm. Carr* late overseer of the poor of the parish of *St. Andrew* above the bars and *St. George the Martyr* in the said county, to the truth of his accounts, upon an affidavit made by *Carr* that he had delivered in an account to the justices, and was ready to swear to the truth thereof according to the statute of 17 Geo. 2. c. 38. but that they had refused to swear him to it.

Mandamus to the justices of Middlesex to swear an overseer to his accounts, according to stat. 17 Geo. 2. c. 38. is of course.

Sir *Richard Lloyd* for the justices opposed it, and shewed for cause that when *Carr* delivered in his account, it consisted of gross sums, and that the justices asked him some questions touching the particulars, which he refused to answer, and therefore they refused to swear him to his account.

Wright Justice: This court has two jurisdictions over justices of peace; 1st, To punish and restrain them when they exercise a jurisdiction which they have not; 2^{dly}, To compel them by *mandamus* when they refuse to do what they by law ought to do: this motion is founded on the stat. 17 Geo. 2. c. 38. which requires the justices to do a thing which they have refused to do; if the justices apprehend that this stat. has not repealed the stat. 43 Eliz. as to overseers accounts, they may return that matter upon the *mandamus*, and then they will have the judgment of the court whether they are obliged to swear *Carr* before he has accounted according to the stat. 43 Eliz. but we cannot refuse to grant the *mandamus*, for it is a motion of course; *Dennison* and *Foster* of the same opinion that it was a motion of course. *Mandamus* granted.

Sir *Watkin Williams Wynne* Baronet, *versus* *Middleton*, Sheriff of *Denbighshire*. In the Exchequer-chamber.

THIS is a special action upon the case upon the statute 7 & 8 W. 3. c. 7. for preventing false and double returns of members to serve in parliament, whereby it is among other things enacted that the party grieved (to wit, every person that shall be duly elected to serve in parliament for any county, &c.) by such false return may sue the officers making the same in any court at *Westminster*, and shall recover double the damages he shall sustain by reason thereof with his full costs of suit.

An action for a false return of a member of parliament on the 7 & 8 W. 3. for double damages is remedial, though founded on a law that is penal, so with-in the statutes of jeofails.

This action was commenced in the King's Bench, the declaration sets forth the writ for electing a member for the county of *Denbigh*, by which the sheriff was commanded to proceed to an election, that it was delivered to the defendant being sheriff before the return thereof, that he proceeded in order to an election, that the plaintiff and one *J. Middleton* were candidates, that the plaintiff had a majority of votes, that the defendant made indentures between him and *J. M.* the other candidate, and returned him to parliament, whereas it is averred that *J. M.* was not elected, but that the plaintiff was elected; that two petitions were presented to the house of Commons, one by the freeholders of the county, the other by the plaintiff himself; that the house thereupon resolved that the plaintiff was duly elected and ought to have been returned, and ordered the return to be amended, and the plaintiff's name to be put in the indenture. and this is laid to be contrary to the form of the statute, and to the damage of plaintiff of 6000*l.* Upon Not guilty the cause was tried in the King's Bench, where the jury gave a verdict for 1400*l.* damages, whereupon the court gave judgment for the plaintiff for 2800*l.* being double the damages found, and for 414*l.* costs of suit, which said damages, costs and charges, amount in the whole to 3214*l.* and the judgment concludes thus, *and the defendant in mercy.*

A writ of error is brought in this court, and two special errors are assigned; 1st, That there is no *venire facias*; 2^d, That there is no *disfringas juratorum*, and then the general errors are assigned; two *certiorari*'s have issued, and the court of King's Bench have certified a *venire facias* and a *disfringas*, and the jury appear to be of the body of the county, and not *de vicineto*; the two particular errors are out of the case, a *venire* and a *disfringas* being both returned, therefore this case comes before this court upon the general errors only, and was three times argued in the most solemn manner, and the last time by the Attorney General and Mr. *Evans*, before *Willes C. J.* of the Common Pleas, *Parker Ch. Baron*, *Abney* and *Burnett Judges* of the *C. B.* and *Reynolds*, *Clarke* and *Clive Barons*, and this term *Willes C. J.* delivered the opinion of the court.

Willes Ch. Justice: The first objection taken by the plaintiff in error is, that the *stat. 7 & 8 W. 3. c. 7.* is a penal law, and excepted in the 4 & 5 *Ann. c. 16.* and therefore the *venire* ought to have been *de vicineto*, and not *de corpore comitatus*; we think that this is not a penal statute, but if it be, it is also a remedial law; but supposing this be a fault, it is cured by the *stat. 16 & 17 Car. 2. c. 8* and we have no doubt at all but it is cured by *stat. 5 Geo. 1. c. 13.* which enacts that no judgment shall be reversed for any defect in form or substance in any bill, writ, &c. so that, be this a fault either in form, or substance, this statute cures it.

The 2^d objection is to the form and substance of the judgment; 1st, to the form that it is not said to be given *secundum formam statuti*, but we are of opinion that as the declaration has set it forth to be a matter done by defendant *contra formam statuti*, it would have been nugatory to have added it again in the judgment; the issue to be tried was, whether the defendant was guilty against the form of the statute; the jury have found him so, and therefore the judgment is so too. 2^{dly}, To the form and substance both, *viz.* That it concludes with *misericordia* instead of *capiatur*; though we do not all agree that this is right, yet the greater part of us agree it is, for in all actions of trespass on the case (which this is) if the defendant be found guilty the judgment shall not be *quod capiatur*, but *quod sit in misericordia*. 1 *Rel. Abr.* 222. p. 11. so in debt on *stat. Ed.* 6. for not setting forth tithes it shall be *misericordia*. 1 *Rel. Abr.* 223. p. 17. *Cro. Car.* 559, 560. *Plowd.* 118. 130. b. Action on the *stat. Hen.* 6. judgment is in *misericordia*. We think this the right judgment, and better than if it had been *quod capiatur*. But supposing the judgment being in *misericordia* was wrong, yet as we are of opinion that this action is to be considered as remedial, it is expressly aided by the *stat.* 16 & 17 *Car.* 2. c. 8. being after a verdict; and in *Comyns* 284 it is held that the statutes of *Jesuits* extend to actions remedial, though they are founded upon penal statutes; we think that if this were a fault, the *stat.* 4 *Geo.* 2. c. 26. for turning the law into *English* has cured it, which has this most remarkable conclusion, that every statute of *Jesuits* shall extend to all proceedings in *English*, and then declares that this clause shall be taken and construed in all courts of justice in the most ample and beneficial manner for the ease and benefit of the parties, and to prevent frivolous and vexatious delays.

The next objection is, that double damages can only be recovered in respect of the return being contrary to the last resolution of the house of Commons, and that it does not appear that there was any last resolution of the house; but we are all of opinion, except *Abney*, that this action is well brought, and that double damages shall be recovered for any false return; and we are not bound by law to take notice from time to time of the particular resolutions of the house of Commons, who of themselves cannot make a law. The case of *Prideaux v. Morris* was an action at common law, so not to the present purpose. But whatever may have been the opinion of Judges, I am very clear myself, that an action at common law will well lie, both for a false, or a double return of a member, for there is *dammum cum injuria* in both cases, and I shall always set my face against the case of *Prideaux* and *Morris*; I do not give this as the opinion of all of us, but only say it by the bye as my own opinion, for I think there cannot be a greater damage in the world; there would be I think the greatest inconvenience if the doctrine should prevail;

502.

3 Lev. 39.
2 Lev. 114.
1 Luitw. 82.
89
2 Salk. 502,
503.
Farref. 13, 14.

prevail that there must be a determination in the house of Commons as to the election, before the action for a false return can be brought, for if so, it would be in the power of the house, to repeal this act of parliament by contriving to put off a petition from time to time for two years, within which time this sort of action must be brought. I declare for myself, that I will never be bound by any determination of the house of commons against bringing an action at Common law for a false, or a double return, and a party injured may proceed in *Westminster-hall*, notwithstanding any order of the house, for the members are not upon oath, nor can they administer an oath to witnesses; and it would be very extraordinary to say, that we, who are Judges upon oath; should be bound by a determination of persons not upon oath; in trying such action for a false return, I would pay great regard to a determination of the house, but yet I would go on. Upon the whole, the court were of opinion that all the faults objected were cured by the verdict, and the judgment was affirmed.

The King *versus* Bestland. B. R.

Order of sessions for appointing one overseer of the poor confirmed.

THIS is a rule to shew cause why an order of two justices, and another of the sessions confirming it for appointing one overseer of the poor only, which is not according to the *stat. 43 Eliz.* which says, that four, three, or two may be appointed, but says nothing of one. *Per Curiam*, The justices may appoint one at a time, and we do not know but they have appointed, or may appoint another, and the court will not presume they have not, and discharged the rule, and the orders confirmed.

N. Lee C. Justice was taken ill of the gout the 27th of January this term, and continued so until the end thereof.

Douglas *versus* Vane. In Chancery.

Court of chancery will not dismiss bill for tithes, and leave plaintiff to his suit in the spiritual court, unless there be a good, legal or equitable bar. Compositions by parson, patron, and ordinary, have been confirmed by decree, since the restraining statutes.

PER Lord Chancellor: This Court never has dismissed bills for tithes, to leave plaintiffs to their suits in the spiritual court, or at law, but only dismissed them when there has appeared to be any good, legal or equitable bar, or defence. Before the restraining statutes, parsons could not alien or make agreement to bind the inheritance of the church without the consent of the patron and ordinary; and since the statute it has been doubtful whether such agreement so confirmed should be carried into execution; but I do agree there have been cases since the statute, where decrees have been made to confirm *compositions* relating to the rights of the church, which have been by the consent of the parson, patron and ordinary, but this has been always where such compositions have been presumed to be for the benefit of the church.

Easter

Easter Term

19 Geo. 2. 1746.

Baxter *versus* Faulam. B. R.

THE single question in this case is, whether an indenture of apprenticeship where six pence is mentioned to be the sum given with the apprentice be or be not void for want of being stamped, according to *stat. 8 Ann. c. 9. sec. 32.* and resolved by the whole court, that the statute intended that when above 50*l.* was paid with an apprentice, a twentieth part thereof should be paid for the duty, and one fortieth part when less than 50*l.* was paid; and this is a case wherein it is well known there is no coin small enough can be paid; and it seems by the two stamps of 1*s.* and 6*d.* in the pound, that no sum less than 20 shillings paid with an apprentice should pay any duty; and this case falls under the saying of *de minimis non curat lex*; and there was no occasion to have this indenture stamped according to the said statute.

Kill *versus* Hollister. B. R.

THIS is an action upon a policy of insurance, wherein a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration; and the plaintiff avers in his declaration that there has been no reference; upon the trial at *Guildhall* the point was reserved for the consideration of the court, whether this action well laid before a reference had been, and by the whole court if there had been a reference depending, or made and determined, it might have been a bar, but the agreement of the parties cannot oust this court, and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Action on a policy of insurance lies, though the policy says the matter shall be referred in case of a loss or dispute.

5/11/650

Anonymous. B. R.

Leave to
compound in
a prosecution
on the statute
against gam-
ing.

POOLE moved on the part of the prosecutor upon the statute against gaming for leave to compound, upon an affidavit that the defendant and one *A. B.* used to play at cards together, and that the defendant had won divers sums of money of *A. B.* that *A. B.* was become a bankrupt, and that the assignees, who set this prosecution on foot, were satisfied with respect to the defendant, and therefore it was now moved that the prosecutor might have leave to compound; which was granted by the court.

Anonymous. B. R.

Infant lessor
in ejectment
must get some
person to be
security for
costs.

MR. Henley moved on the part of the defendant in ejectment that proceedings might be stayed until the lessor of the plaintiff, who was an infant, had got somebody to enter into a rule to pay defendant his costs, if there should be a verdict for the defendant, because the lessor himself being an infant, was not liable for costs. Rule to shew cause; afterwards made absolute.

Rhenish *versus* Martin. In Chancery.

Legacy to a
daughter pro-
vided she
marry with
consent of
trustees; she
marries with-
out their con-
sent.

LORD Hardwicke Chancellor: *Eliz. Phillips*, the mother of the wife of the plaintiff, and of the wife of the defendant *Martin*, by her will dated the 27th of *October* 1729. devised her real estate to her daughter *Martha* and her heirs for ever; and then says, "It is my will that if my said daughter *Martha* shall intermarry with any son of *A. B.* such my devise to be void, and in that case I devise my real estate to trustees for my daughter *Mary* and her heirs of her body;" then comes the clause upon which the question in this case arises. "I provided always, and it is my will, that if my said daughter *Mary* shall marry, and with the consent of my trustees aforesaid, or the major part of them, before such marriage had, signified in writing, then and not otherwise I give and devise to my said daughter *Mary* 800*l.* and it is my will that my said daughter *Martha* shall pay my said daughter *Mary* 30*l.* yearly, during the said *Mary's* continuing sole and unmarried, by 15*l.* every *May-day* and *Michaelmas* day; and I do hereby charge and load all my said real estate with all my debts and legacies of all kinds, and appoint my daughter *Martha* sole executrix and residuary legatee.

Eliz.

Eliz Philips the testatrix died in 1736. the plaintiff intermarried with her daughter *Mary* 27 Sept. 1737. but no consent of the trustees was had previous to the marriage; and this bill is brought by the plaintiff as administrator to his wife *Mary*, for payment of the said 800 l. and the arrears of the said annuity.

The question is, whether the plaintiff is intitled to this legacy of 800 l.

1st, I shall consider it as if it had been a mere personal legacy only, and payable out of the personal estate.

2^{dly}, I shall consider it as supposing it had been charged upon the real estate originally.

And 3^{dly}, I shall consider it as an original personal legacy charged upon the personal estate, and that the real estate is an auxiliary fund, in case the personal estate shall not be sufficient to pay all the debts and legacies.

As to the first; considering it as a personal legacy, and payable out of the personal estate; according to the rules established both in this, and the ecclesiastical court, the plaintiff as representative of his wife will have a right to recover it out of the personal estate, for in both courts such condition has always been considered only *inter-rem*; and indeed the civil law makes such conditions void, notwithstanding the legacy be given over, as to pious uses, or for manumission, &c. but that has not been received so, in this court, but when ever the legacy is given over for breach of the condition, the gift over shall take place upon this foundation, because it thereby appears clearly that the person, to whom it was given over, was in the mind and contemplation of the testator at the time of making his will, but in the present case there is no such gift over; it was objected by the counsel for the defendant at the bar that this was a condition precedent, and not subsequent; and this difference was insisted upon, that in the first case the condition must be performed before the legacy can vest; in the latter, that the legacy vests immediately, but must be divested by non-performance of the condition; and it was said that this was a distinction that has been established: but neither the civil law, nor the ecclesiastical law, have made any difference whether it is precedent or subsequent, for both those laws say, the condition is void; to prove this, *Swinb. p. 4. c. 12.* where there are many cases put, the greater part whereof are of conditions precedent: all conditions impossible, *legibus interdictu*, or *probrosa*, by the civil law, are void, and the legacy is absolute and without condition; *Comyns 738.* therefore it is not material whether it be precedent or subsequent, since (as in this case) it is void by the civil law, as therefore the difference taken would
not

not prevail in the civil law, neither can it here, for this court, in the case of personal legacies will, and always hath followed the ecclesiastical court.

2dly, If this legacy had been charged upon the land, how far in that case the plaintiff would have been intitled to it supposing the condition not performed; it must be understood in what manner this is charged upon the land; first it is given to the daughter as a personal legacy, but afterwards follow these words; "I do charge all my real estate with my debts and legacies;" if the legacy had been originally charged upon the land, and given upon the condition before mentioned, it could not have been contended that the plaintiff could have recovered it after breach of the condition; and indeed it would be contrary to the rule of the common law (to decree it to the plaintiff) which always favours the heir, and contrary to the determination of the Judges in *Harvey* and *Ashton*, for the difference taken there is, that this court follows the rule of the civil law, because that was the original jurisdiction for the recovery of personal legacies; but whenever land is in question, or to be affected, this court follows the rule of the common law; and in all cases, whereof this court takes cognisance of suit, where the original jurisdiction arises in another *forum*, the rule of this court is always to follow the law of that *forum* or court, for, if this court did not pursue that rule, there would be different remedies in different courts which would create great inconvenience, and the rule of right would be different in different courts; but though this be so in the case of a personal legacy, it is not so in regard to lands affected or charged with legacies, because the property of land must be governed by the law of *England*, and where it is a legacy charged upon land, it must have the same consideration as a devise of the land itself would have had. *Vide King and Withers, Preced. in Canc. 350. Porter and Fry, 1 Vent. 199 Harvey and Ashton, Comyns 726, &c. and three cases therein cited, viz. Fleming v. Waldegrave, 1 Cha. Caf. 58. Needham v. Vernon, temp. Ld. Nottingham. Sempbill v. Bailey, Prec. in Canc. 562. Vide 2 Vern. 416. 452.* I am of opinion, if this case stood as an original charge upon land, the plaintiff could have no right to demand it.

As to the third consideration; this being an original personal legacy, the plaintiff is intitled to have an account of the personal estate of testatrix, but not of her real estate: so that another question arises in this case, *viz.* whether this court should not marshal the assets of the testatrix in such a manner as if possible to give the plaintiff satisfaction for this legacy; and I am of opinion this court ought to do so, the other legatees and creditors in this case have both the real and personal estates for their security; here is a personal legacy payable out of the personal estate, but it cannot charge the real estate directly;

directly; then the question is, whether this court shall not turn all the rest of the legacies and debts upon the real estate, and leave so much of the personal estate as shall be sufficient to pay this legacy; and I am of opinion this court should do so; and the Ld. Chancellor decreed for the plaintiff accordingly.

The Parish of St. Luke *versus* The Justices of Middlesex.

RULE to shew cause why the court should not grant a *mandamus* to the justices, commanding them to make out a warrant of distress to levy the poor's rate grounded upon an affidavit, whereby it appears that a poor's rate has been made, and that some of the parishioners have refused to pay it, but that the justices refuse to grant a warrant of distress without first summoning and hearing the parties.

Mandamus to the justices of peace to make a warrant of distress for the poor's rate.

Per three Judges *contra* Wright J. a *mandamus* must go, for by the same rule that the court grants a *mandamus* to make a rate, they ought to grant a *mandamus* to make a warrant to levy that rate. And the rule was made absolute; the justices may return what they please upon it.

Trinity Term

19 & 20 Geo. 2. 1746.

Nott un' &c. *versus* Oldfield. B. R.

Practice.
Where bail is
filed there
must be a plea
demanded in
writing, al-
though a no-
tice to plead
be upon the
declaration.

THE *latitat* was returnable the second return of last term, being the 22d day of *April*; on the 24th of *April* a declaration was left in the office *de bene esse*, with notice on the back thereof to plead in four days; upon the 26th of *April* the defendant put in special bail, and gave notice thereof to the plaintiff's attorney; and a rule to plead being entred in the office, the plaintiff's attorney, when that rule was out, signed judgment without demanding a plea; and now it was moved by Sir *John Strange* to set aside this judgment for irregularity in not demanding a plea; Sir *Richard Lloyd* and Mr. *Ford* for the plaintiff insisted, that by the rule of court of the 10th *Geo. 2.* there was no occasion to make any other demand of a plea besides the notice to plead on the back of the declaration, which was sufficient. But *per curiam*, The rule was only made to enable plaintiffs to proceed before bail was put in and filed, and made no other alteration in the practice; for wherever a rule is given to plead, and the defendant files bail in time, (as here he has done,) a plea must be demanded in writing, and the judgment must be set aside with costs.

Smith Executor of Cod *versus* Hill Executor of Clark.
B. R.

Being 326

5 Rec 341

ACTION upon a promissory note dated 1734. defendant pleads that *J. Clarke* his testator in his life-time did not undertake within six years: the plaintiff replies that *Jos. Cod* his testator, after the making the promise (by *Clark*) on the 20th of *August* 1736. went out of the kingdom of *Great Britain* into *Ireland*, and lived beyond sea till his death, and being so beyond sea made his will, and appointed plaintiff executor thereof, and afterwards, within six years after making the said promise, plaintiff's testator died beyond sea, his executor or administrator, do not sue within six years, they are barred by the statute.

sea, and that the plaintiff himself at the time of his testator's death was also beyond sea, and in *April* 1740. arrived in *England*, which was his first arrival here; and that the plaintiff forthwith after his arrival duly proved the will, and within six years after his said arrival in this kingdom filed his bill in this cause; defendant demurs; and the plaintiff joins in demurrer.

Poole for the defendant objected that the replication is ill, because it does not say that the plaintiff's testator was out of the kingdom at the time the cause of action accrued, but that he departed the kingdom after the making of the promise; and there is no new cause of action, for the plaintiff as executor must proceed upon the old cause of action; and if the plaintiff be in *England* at the time the cause of action arises, as the plaintiff's testator was, the time of limitation begins to run; and of that opinion were the whole court, and gave judgment for the defendant. *Stracey* for the plaintiff.

Wheeler & Ux' *versus* Philadelphia Bingham and Richard Bingham, Esq; In Chancery, June 14, 1746.

JOHN Pottinger by his will dated the 30th of *April* 1730. devised all his real and personal estate to trustees, upon trust that they should pay to each of his granddaughters which should be living at the time of his death 1500*l.* upon the several and respective days of their marriage; "And I desire that none of my said granddaughters shall marry without the consent of their father and mother, or the survivor of them; if therefore any or either of them shall marry without such consent, I hereby revoke what was before directed to be paid to such granddaughters, and such of them shall not be intitled to any benefit by virtue of my will, further than what their father and mother, or the survivor of them, shall direct or appoint; and if any sum of money shall be remaining in the hands of the said trustees, that the interest of such sum of money shall be paid to my daughter *Philadelphia Bingham* during her life, and after her death the principal shall be paid to *Richard Bingham*, Esq;"

A legacy is devised to a granddaughter to be paid on her marriage, and if she marry without consent, "I hereby revoke what was before directed to be paid her," is only in *terrorem*.

Leonora, one of the testator's granddaughters, married the plaintiff *Wheeler* after her father's death, without the consent of her mother *P. Bingham*, one of the defendants; and the plaintiffs preferred their bill to have *Leonora's* legacy of 1500*l.* with interest from the day of their marriage.

Lord Chancellor: The desire of the testator that his granddaughters should marry with the consent of their father and mother, or the

the survivor of them, was very right; and if this was *res integra*, I should have gone as far as I could to prevent the legacy from taking place, but there have been such a number of resolutions and decrees passed in this court in similar cases, that were I to go contrary to them, it would be to unfix the settled rule in devises of this kind, and doing a greater mischief to many, than any particular good in one case can warrant.

The first question is, whether the condition annexed to this legacy is effectual to prevent the granddaughter *Leonora* from having her legacy, or whether the court shall consider it only as inserted in the will *in terrorem*?

2dly, Whether there is any bequest *over* of this legacy, or any thing in the will that amounts to such a bequest *over*?

And first, to prove that it is a condition that ought to have its effect, it was argued for the defendants that it amounts to a condition precedent, and therefore, by the rule of law, the person intitled must shew it to be performed; but the answer to this is, that it is a personal legacy (for Mr. *Bingham* the defendant has admitted personal assets sufficient) and therefore (if not given *over*), must be governed by the rule of the ecclesiastical courts and the civil law, by which this condition is void, and the legacy will be absolute without any condition; and consequently it is immaterial, whether it be precedent or subsequent, since it will be null and void; and it would be strange, when the law makes a condition void, and saith the legatory shall be discharged from the condition generally, to say it shall be so *only*, where the condition is subsequent, not where it is precedent; the true reason why this court holds a pecuniary legacy given on condition that the legatee shall not marry without consent ineffectual, is, to preserve an uniformity in the determinations upon this point, in *this* and the ecclesiastical court; for since pecuniary legacies may be sued there where such a condition as this would be held void, it would be extremely inconvenient if this court was to decree contrary to the ecclesiastical courts.

Harvey v.
Ashton,
Comyns 734.
738.

Porter v. Fry,
1 Mod. 308.

I take this to be a condition subsequent; and although it has with some truth been said at the bar, that the legacy did not vest until the marriage, and *that* being without consent (it was said) the legacy was *eo instante* divested; yet there is a difference in the operation of law, and in the order of things; and I think a subsequent consent of the mother after the marriage would have been sufficient to make the legacy good to *Leonora* although it had been given *over*; and so in the order of things, for it has been truly said by Mr. Solicitor General for the plaintiff, that she need shew nothing but her marriage,

neither

neither here, nor in the ecclesiastical court, when she comes for her legacy, and it must come from the other side to shew it was without consent.

But 1^{stly}, it is said that if this be not a condition precedent, yet it ought to have its effect, because here is *that* which amounts to a devise of the 1500 *l.* over; as 1st, The plain intention of the testator, and 2^{dly}, A gift of the interest to the mother for life, and of the principal, to the defendant *R. Bingham* after her death.

As to the 1st, There have been many cases in this court where the intention of the testator has been as clear as the sun, that a daughter marrying without consent shall not have the legacy, and yet this court has always decreed it to be paid, when it is a pecuniary personal legacy, and not devised over; and therefore the court is not governed in this by the intention of the testator, but chiefly has regard to that justice which it ought to do, with respect to the right of a third person to whom a legacy is devised over upon breach or non-performance of a condition, whom the testator at the time of making his will had in contemplation as much as any thing else; indeed the court in such cases has often said, where there is a devise over to a third person, it thereby appeared to be the intent of the testator, that *that* person should have the benefit of the bequest over, but that was said only to prove the right of such devise over; therefore the determinations of this court in this point do not solely depend upon the intention of the testator, but upon the right of the legatee over, which cannot be taken from him.

And therefore whether there is any thing here that amounts to a bequest over in point of right is the 2^d question; and I am of opinion there is not; I agree that if it had been said in the will, that in case my granddaughter marry without consent, I revoke her legacy, and give power to my daughter to dispose of that sum to such uses as she shall think fit; *that* would have been a gift over, for it would have amounted to a gift of the property: but the gift in the present case does not amount to that, for it is only an abridgment, or a power to the father and mother to abridge the legacy; the father himself if he had survived the mother, could have taken no benefit of this legacy, but when he had so abridged it, the remainder of it would have fallen into the *residuum*? suppose the mother had appointed 500 *l.* to *Leonora*, or the testator had said in his will, if she marry without consent she should only have the interest of the 1500 *l.* for her life, *that* could not have taken place unless the principal had been devised over; it is said that by the words, "If any money shall be remaining in the hands of the said trustees", &c. is meant such sums as shall remain by reason of any granddaughter's marrying without consent; but that is not the meaning of them, for this being a devise to trustees of all the real and personal estate, it must

What will or will not amount to a devise over of a legacy.

2 Vern. 293, 294.

A devise of
the residuum
is not a devise
over of a par-
ticular legacy.

mean the *residuum* of the personal estate, and the devise of the *residuum* has been determined not to be a devise over in cases of this kind; for where it is not expressly devised over, and is only to fall into the surplus, the daughter shall take it; perhaps this distinction may be thought very nice; I admit it to be so, but it is now an established rule that there must be an express bequest over of the particular legacy, and that a bare gift of the *residuum* will not be sufficient to deprive the daughter of the legacy, and there are many cases to prove this; the reason is, because when a testator makes one a residuary legatee, he has not that particular thing in his view or contemplation; indeed during the arguments in this case, I once thought that as the mother was made residuary legatee for life only, it might be considered as a legacy given over to the mother for her to dispose of at her pleasure, but it is plain that the power is given to the father and mother and the survivor, and therefore the father might have had the disposal or power of abridging it; so the plaintiffs are intitled to a decree under proper restrictions, for the legacy and interest since the marriage, but the defendant must be allowed for maintenance from *Leonora's* father's death, and the husband *Wheeler* must deliver proposals of a settlement to the master.

Moore *versus* Fernhaugh. B. R.

2 Stra. 1258.
S. C.
Court will
not change
the venue into
next adjacent
county to a
Welsh coun-
ty.

2 Ld. Raym.
1418.

Nor into a
northern
county where
assizes are but
once a year.

MR. *Ford* moved to change the venue from *Middlesex* into the next adjacent county to the county of *Denbigh*; but it was denied *per curiam*, and they said it had been often denied; *Dennison* Justice cited *Lloyd v. Williams*, Mich. 8 Geo. 2. in an action of assault and maihem, which he said he moved himself to change the venue to the next adjacent county to that county in *Wales* in which the cause of action arose; and the court then refused it, and cited *Howarth v. Williams*, where it was denied again. Lee Ch. J. I have known this done by consent but never without. *Vid. Godfrey v. Filpot*, L. Ray. 1418. And N. The court will not change the venue into a northern county where the assizes are but once a year, if moved in *Michaelmas* or *Hilary* term, because of delay; and *per Wright* Justice, this was refused in *Nichols v. Bolster*.

Rex *versus* The Justices of Peace of Westmorland. B. R.

Mandamus to
appoint over-
seers of the
poor in a
hamlet where
there were
never any
before.

MR. *Harrison* moved for a *mandamus* to be directed to the justices to appoint overseers of the poor for the hamlet of *Nethergravesbip*, *Watsfield* and *Churckfield*, (there never having been any overseers of the poor there before) upon the *st. 13 & 14 Car. 2. c. 12. s. 31.* which gives power to appoint overseers (in large parishes) in particular hamlets, as the *st. 43 Eliz.* does in parishes at

at large; and it was granted upon an affidavit that there was poor belonging to this hamlet, which were chargeable to the hamlet of *Kirkland*, which could not remove them, because there were no overseers of *Netbergraveship*, &c.

Qui tam by the Town of Dover *versus* Hodgson. B. R.

UPON an information against the defendant for following a trade contrary to the stat. of *Eliz.* the defendant had a verdict, and obtained a sidebar rule for costs; and now it was moved to set the rule for costs aside, by Mr. *Smythe*, who insisted the defendant was not intitled to costs, because he himself removed the information from the sessions; upon shewing cause by Serjeant *Wynne*, the court seemed to think there could be no doubt but that the defendant must have his costs upon the stat. 18 *Eliz. c. 5.* but ordered precedents to be searched for in the crown-office.

Defendant removes an information from the sessions, and having a verdict, he shall have his costs.

Michaelmas Term

20 Geo. 2. 1746.

Rex *versus* Ingleton. B. R.

THE defendant was indicted for an attempt to commit felony, by attempting to set on fire the house of one *Eston* in *York*, and the indictment also charges that the defendant solicited *Mason*, one of the prosecutors, to help to set fire to the house; *Mason* and one *Glenton* informed the mayor of *York* of this, who bound *Mason* and *Glenton* over to prosecute the defendant. The defendant removed this indictment by *certiorari* into this court, and entered into a recognizance in the penalty of 20*l.* to appear and plead to the indictment, and to prosecute it to be tried at her own expense, which she has accordingly done, and has been convicted and fined; and now it was moved by Mr. *Ford* that the recognizance might be discharged, she having paid the fine; this was opposed by Mr. *Henley* and *T. Robinson*, who insisted that by the stat. 5 & 6 *W. & M. c. 11.* the defendant was obliged to pay the

Where a defendant who removes an indictment into B. R. by *certiorari*, and is convicted, yet shall not pay costs on stat. 5 & 6 *W. & M. c. 11.* to the prosecutors.

prosecutor's costs; but *per curiam*, this case is not within that act of parliament, for that extends only to officers and persons really injured, which neither *Glendon* nor *Mason* the prosecutors are in this case; for there was no damage done to the house, it was only intended to be done, nor are either of them officers, and therefore the rule was made absolute for discharging the recognizance by three judges, *absente Forster* Justice, who was at *St. Margaret's Hill* trying the rebels.

Frammingham *versus* Brand. In Chancery.

The word *or*
construed to
be a copula-
tive in a
will.

3 *Atk.* 390 9.

2 *Stra.* 1175.

THE question before Lord *Hardwicke* was upon these words in a will, (*viz.*) "I give and bequeath the inheritance in fee-simple of all my lands to *R. F.* my son, and to his heirs and assigns for ever, and in case the said *R. F.* my son happen to die in his minority, *or* unmarried, *or* without issue, then I give the inheritance in fee to *Henry Bland*". *R. F.* attained the age of twenty-one, but died unmarried and without issue. Lord Chancellor held that this contingent executory devise to *H. B.* could never take place, for both the words *or* are to be taken in a copulative sense, and unless *R. F.* had died in his minority *and* unmarried, *and* without issue, *H. B.* could never take; for if this was to be construed otherwise it might happen that *R. F.* might marry and die leaving issue in his minority, *which* would be disinherited if the estate was not to vest in him absolutely on his marriage, which could never be the intent of the testator; and the case of *Barker and Surtees* *B. R. Mich. 16 Geo. 2.* was held to be good law, which was adjudged upon these words in a will, (*viz.*) I give the said premises to my grandson, his heirs and assigns, but in case he dies before he attains the age of twenty-one years, or marriage, and without issue, then he devised the same over to another person; the first devisee attained twenty-one, but died unmarried and without issue; and it was held *per totam curiam*, that by attaining the age of twenty-one, the estate became so absolute in the first devisee that the executory devise could never take effect, or vest; and *Dennison* Justice said he would consider it the same as if the testator had said, "If my grandson *A. B.* die under 21, and unmarried, and without issue," which he did not do, for he attained his age.

Wood *versus* Newton. B. R.

573rd 1035

4B2A345 8116489

THIS is an action upon the case, wherein the plaintiff declares upon an *indebitatus assumpsit* for 21 l. for the use and occupation of land by the defendant, at his request and by the permission of the plaintiff, also upon a *quantum meruit* for the like; also upon an *indebit' assumpsit* for 40 l. for divers cattle, goods, wares and merchandizes sold and delivered, and also upon a *quantum valebant* for the like.

Assumpsit.
The declaration is of Easter term in the 18th year of King George the second.

As to the promises and undertakings in the said declaration; 2dly, 3dly, and lastly abovementioned, and also as to the promise and undertaking in the said declaration first mentioned, except as to 9 l. 2 s. 6 d. parcel of the said 21 l. contained in the said promise and undertaking in the said declaration first abovementioned, the defendant says, that he did not promise and undertake in manner and form as the plaintiff hath above complained against him, and thereupon issue is joined; and as to the said promise and undertaking in the said declaration first abovementioned as to the said 9 l. 2 s. 6 d. parcel of the said 21 l. therein contained, that the plaintiff ought not to have his action against him, because he says that after the making the said promise as to the said 9 l. 2 s. 6 d. and before the exhibiting of the said bill of the said plaintiff, that is to say, on the tenth of April 1745. at S. aforesaid, he the said defendant tendred and offered to pay to the said plaintiff 9 l. 2 s. 6 d. which the said plaintiff then and there refused to accept from the defendant, and the defendant further says that he always hath been and still is ready to pay the same, and brings the money into court ready to be paid to the plaintiff, if he will accept the same, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his said action to recover any more damages than the said sum of 9 l. 2 s. 6 d.

The plea of the same term, signed by Poole.

Tender before exhibiting the bill.

The plaintiff impurrs to the said plea until Friday next after the morrow of the holy *Trinity*, and then replies, and says that he ought not to be barred from having his action, &c. because he saith that the said plaintiff after the making of the said first promise in the said bill, and before the exhibiting the said bill of the said plaintiff, to wit, on the 12th day of February in the 18th year of his present Majesty, prosecuted out of the King's Bench a writ of *latitat* (setting out the writ) which process he the said plaintiff prosecuted against the defendant with an intent to serve him personally with a copy thereof according to the statute, and that the defendant might appear at the return of the said process in the said court at the suit of the said plaintiff, and that the said plaintiff might proceed there-

Replication. that plaintiff sued out a *latitat* anterior to the tender.

PART I.

O o

upon

upon and exhibit his said bill against the said defendant, and him might implead for recovering and obtaining, among other things, the said 9*l.* 2*s.* 6*d.* according to the course and usage of the said court here; and the said plaintiff according to his said intention afterwards, to wit, in the said *Easter* term in the 18th year aforesaid, declared by his said bill against the said defendant in form aforesaid, for recovering and obtaining the said damages contained in the said bill; and the said plaintiff further says, that the said defendant at any time before the suing out and issuing of the said writ of the said Lord the King of *latitat* aforesaid, did not tender or offer to pay to the said plaintiff the said 9*l.* 2*s.* 6*d.* in manner and form as the said defendant hath above in pleading alledged, and this the said plaintiff is ready to verify, wherefore he prays judgment and the damages which he hath sustained by reason of the non-payment of the said 9*l.* 2*s.* 6*d.* parcel of the said 21*l.* contained in the said first promise, to be adjudged to him, &c.

E. Bootle.

Rejoinder, admits the cause of action accrued before the filing the bill, but denies that he made any promise before the *latitat* issued.

The defendant rejoins, and says that the plaintiff ought not to have his said action for the said 9*l.* 2*s.* 6*d.* &c. because he says that it is true that he the said defendant did make such promise and undertaking as to the said 9*l.* 2*s.* 6*d.* before the exhibiting the bill of the said plaintiff, as by the said bill is alledged; but the said defendant further says, that he the said defendant at any time before the suing out or issuing of the said writ of *latitat* abovementioned, did not promise and undertake to pay the said plaintiff the said 9*l.* 2*s.* 6*d.* parcel of the said 21*l.* &c. as the said plaintiff by his said plea above in reply pleaded hath above supposed; and of this he puts himself upon the country.

D. Poole.

Demurrer.

Plaintiff imparls till *Wednesday* next after three weeks from the day of *St. Michael*, and then demurs generally; defendant joins in demurrer.

This case was solemnly argued last term by Serjeant *Bootle* for the plaintiff, and *Poole* for the defendant, and it was this term argued the second time by Sir *Thomas Bootle* for the plaintiff, and Mr. *Ford* for the defendant.

It was objected by the plaintiff that the rejoinder is bad, because a *latitat* may be tested before the cause of action accrued, and if it may, then the issue tendered by the rejoinder is immaterial. *Cro. Jac.* 561. 1 *Vent.* 28. Sir *Thomas Bootle* cited *Matthews v. Spicer B. R.* whereof he had the paper book then in his hand of *Pasch.* 12 *Geo.* 1. which was an action upon several promises; the defendant as to all except 4*l.* 4*s.* mentioned in the fifth promise pleaded the general issue, and as to that 4*l.* 4*s.* he pleaded that after the promise to pay that sum and before the time of filing the bill, *viz.*

the 2d of *April*, he tendered the money. The plaintiff replied that before the filing the bill, *viz.* the 12th of *February*, he sued out a *latitat* with intention that the defendant might be served therewith and proceed against him thereupon, and that the defendant did not tender before the suing out of the *latitat*; upon this the defendant did not rejoin to the fact, but demurred upon the replication; and the court were of opinion that the *latitat* might be sued out before the cause of action accrued; and cited the two cases above for that purpose; if therefore a *latitat* may be sued out before the cause of action arises, the issue tendered in this case is immaterial; and if the replication is ill, the defendant ought to have demurred to it, and not have rejoined to the country; and Sir *Thomas Bootle* relied upon this, that the defendant had tendered an immaterial issue, and therefore prayed judgment for the plaintiff. But notwithstanding this objection, judgment was given for the defendant, upon Mr. *Ford's* argument for him, which was as follows:

Mr. *Ford* for the defendant: It is admitted upon this record first, that the defendant was always ready to pay the debt claimed by the plaintiff; there is no pretence of any demand or refusal, but on the contrary a constant readiness to pay is admitted.

2dly, It is admitted that at the time of suing out the *latitat* the plaintiff had no cause of action.

3dly, I do insist, and think it must be admitted to me in point of law, that if at the time of the commencement of a suit the plaintiff has no cause of action, a subsequent right of action will not support it, but the court *ex officio* ought to abate the writ.

It is objected for the plaintiff that the defendant's rejoinder is frivolous, that the existence of the cause of action before the suing out the *latitat* is immaterial, for that the *latitat* is only a summons to bring the defendant into court, is only process to compel an appearance, and that if a cause of action accrues in a vacation, the party may legally sue out process of a preceding term, so that it is of no consequence whether the plaintiff had any cause of action at the time of suing out the *latitat* or not, and for this purpose *Co. Jac.* 561. is cited, which was an action for an escape upon a *latitat* tested the 29th of *June*, when the bond debt upon which the arrest was made, did not accrue until the 29th of *August* following; this was held right, for the *latitat* not being returnable till the term after the bond was given, that is sufficient to maintain the arrest, and the process sued out in the vacation always bears teste the preceding term; *1 Vent.* 28. where it is held a *latitat* may be taken out, but a man cannot be arrested upon it before a debt is due; and this differs from an original writ, which if it bear teste before the money is due it is abateable

abateable, but a *latitat* is not only to bring defendant *in custodiam*, that the plaintiff may declare against him, but that he may have bail, and after *that*, the proceedings upon the *latitat* cease; upon the authority of this case it must be admitted that either the rejoinder is good, or the replication is bad; and if the replication is good the rejoinder of consequence is good likewise; for considering the *latitat* as a summons only, that according to the course of the court it may bear *teste* of a term precedent to the cause of action, how then is a tender before the issuing of it material? can a man tender before the cause of action exists? this is impossible; suppose an issue had been taken of the fact alledged in the replication, that no tender had been made before the suing out the *latitat*; and suppose this had been found for the plaintiff, could such verdict have been material? the *latitat* might have issued before a tender could have been made, and therefore the finding there was no such tender, when it was impracticable to be made, would have been immaterial.

Upon considering the replication the court will take notice of the course and practice of issuing *latitats*, as well as in determining upon the rejoinder, and then taking the *latitat* only as a summons to enforce an appearance, it appears upon this record that the plaintiff hath no way defeated the force of the defendant's plea but by shewing that though it is admitted a proper tender was made before the bill was filed, yet none was made before the *latitat* issued; or, in other words, that none was made before there was any debt due; how does this defeat the plea which alledges that the defendant made a tender before the bill was filed, and was always ready to pay the money from the time he owed it? If the plaintiff would consider the *latitat* as a summons, ought he not to have gone further in his replication, should he not have shewn the issuing the writ, and that no tender was made before the service of it? this was done in *Cro. Car. 264. Watts v. Baker*; it was trespass *quare clausum fregit*; the defendant pleaded a tender of amends: plaintiff replied a *latitat*, (as here,) and that the tender was made after the arrest upon it; and it was resolved that this tender came too late, for as well as a tender after an original writ comes too late, so after an arrest upon a *latitat*, for the tender of amends must be intended to be immediately after the trespass committed, and before any suit.

What then are the times when a tender comes too late? 1st, After the *teste* of an original; 2^{dly}, After the service of a *latitat*, for the *teste* of a *latitat* is insisted to be quite immaterial. How then is the plea answered? does the present replication shew that the tender came too late? does it prove that it was not made before the service? is that the commencement of the suit upon this sort of process? if it is, what can be inferred, or be tried by the replication as it stands?

The

The business of a replication is either to deny the facts in the plea, or to confess and avoid them by some other facts, which, if found, shew that the allegations in the plea are nothing to the purpose; suppose the facts in the replication found with the plaintiff, would they have that effect? does it follow that because the tender alledged was not made before the *teste* of the *latitat*, that therefore it comes too late? it certainly does not, and therefore if no certain issue can be taken on the rejoinder because of the immateriality of the *teste*, neither can any be taken on the replication.

What matter
a replication
ought to con-
tain.

But supposing the replication be good, the rejoinder is a compleat answer to it.

First, the replication states a *latitat*, and concludes that no tender was made before the issuing of it; what is the answer? I admit there was no such tender, that fact is confessed, but this is the reason, at the time such writ issued, the plaintiff had no cause of action, and so no tender could be made; is not this an answer to the replication, and a material one too? the defendant thereby assigns a reason for not doing the thing which the plaintiff complains he ought to have done.

But 2^{dly}, Supposing the replication be good, it can be only so upon this ground that the *latitat* is to be considered as an original and the foundation of the suit; in this light, and no other, the issuing the process is the commencement of the suit, and the plaintiff treats this *latitat* exactly in the same manner as if he had sued out an original, and on this ground it is that a *latitat* sued out and continued on the roll prevents the statute of limitations; from the time of the *teste* of a *latitat* when it is set forth in pleading the action is considered as subsisting, though it was never served as process, but only taken out with an intention of filing a bill; 1 *Sid.* 53, 60. and from that time all the books say that in the King's Bench the action is commenced; and in the case of *Culliford* and *Blandford*, where the question was, whether suing out a *latitat* within the year was the commencement of an action within the 31 *Eliz. c.* the words of the book are, "As to this question, three Judges held clearly that the suing out a *latitat* within the year was a sufficient commencement of the suit to save the limitation of time, because the *latitat* is the original of the King's Bench, and may be continued on record as an original writ;" and it has been adjudged that the suing out a *latitat* within the time, is sufficient to prevent the incurring the statute of limitations; and *Holt Ch.* Justice does not dispute the principle whether the suing out a *latitat* be the commencement of a civil action, or whether it is the original of the plaintiff's suit, but only distinguishes between *that* and a popular action, in which case he thought a bill ought to be filed on record; this case

proves plainly that the suing out a *latitat*, or the exhibiting the bill, may in this court be the commencement of an action; that it is in the plaintiff's election either to make one or the other the original; that from the time of issuing the *latitat*, where the plaintiff insists upon it the suit is as much subsisting as if commenced by an original; and if this be so, why is the rejoinder immaterial, if the replication be good? the plaintiff insists the action was commenced before any tender, he has alledged the *latitat* as the institution of his suit, relies upon the *teste* of it as the ground of this bill, as that point of time to which all the subsequent proceedings ought to have relation, and therefore why should it not abate the proceeding, if prosecuted before any cause of action? shall it have relation to support proceedings in order to save a debt and to do justice? shall it relate to deprive a man of the benefit of the statute for limiting of a popular action? shall it in the replication be a sufficient allegation of the commencement of a suit in order to avoid a legal tender, and yet not be a commencement of the suit to abate an unjust action; to say otherwise would be to make the *latitat* the commencement; and not the commencement of the suit on the same record. Upon this record it cannot be questioned but the insisting of the *latitat* is an unconscionable attempt to do injustice; it is a new experiment to involve honest men in difficulties, and to put them in the power of malicious creditors.

It was objected upon the first argument, that the defendant might have relieved himself by pleading that he had tendered before notice or service of the *latitat*. To this I answer, that if the suing out of a *latitat* in a civil action be the commencement of a suit, a tender subsequent though before notice would be to no purpose; the commencement of a suit is a demand of a debt, and a tender after a demand is of no use, that would be directly to contradict his plea, that says he was always ready. But supposing such an allegation should be received, why is the defendant to be put upon making it? the plaintiff, who insists upon a *latitat*, has it in his power to use it as he pleases, either in the nature of an original, or as a summons, to bring the party into court; if he chooses to consider it as an original, as the commencement of the suit, why should the defendant be obliged to treat it in a different light; why is the court to consider it in a different manner than the party desires, who sued it out.

By the rule of law every man's plea is to be taken most strongly against himself, and by this rule the suing out the *latitat* must be taken on this record to be the commencement of the action, as *that* which the plaintiff has elected and chosen to be such, and which the court cannot consider otherwise without making a construction on the rejoinder that oppugns the replication. But supposing such a
rejoinder

rejoinder would be bad, the *teste* and suing out the *latitat* is a matter of record; those records, all persons are bound to take notice of, and it should seem, that to say the tender was made before notice of the *latitat* would be wrong; and it may be compared to the case of an executor, who pleaded *plene administravit before notice*. Carter 227. Meller v. Overton; such plea is not good, but the defendant must plead *plene administravit ante diem impetrationis brevis originalis*. Ward v. Dobson, Hil. 2. G. 2. C. B. plea of *plene administravit before notice* held ill, for all may resort to records, and defendant should plead according to 3 Lev. 28. *Et quod ipse nulla habet bona vel catalla testatoris vel habuit die impetrationis brevis prædictæ vel unquam postea*. And though these cases are of original writs, yet the law must be the same of *latitats* whenever insisted on as the commencement of the suit; they are both equally of record and notorious to the world, and there cannot be any averment against one but what may be equally made against the other; and there can be no harm in considering the *latitat* in this light; if the plaintiff had any merits, instead of resorting to the *latitat* he might have replied a demand and refusal, and so falsified the plea of the defendant; therefore to conclude, that if the rejoinder be bad because it offers an issue of a fact depending on the issuing of a *latitat*, the replication is in like manner equally so, and then the plaintiff is guilty of the first fault; on the other hand, if the replication be right, the rejoinder is so likewise, as it only offers an issue on the same ground that the replication does, viz. that the suing out the *latitat* is the ground of the action.

Judgment of the court.

Lee Ch. Justice: In general the suing out a *latitat* is not material; and in the cases cited it is considered only as process to bring the party into court; but in the present case the plaintiff seems to aim at a surprise, and if this *latitat* is not to be considered in the nature of an original writ, what is it? when it is replied to the statute of limitations pleaded, or to avoid a tender, is it not the commencement of the suit? the defendant ought to have the same advantage of it as the plaintiff; so I think the *latitat* in this case is to be considered as an original writ, as the plaintiff himself in his replication has made it the commencement of his suit; and judgment must be for the defendant.

A *latitat* may be considered in the nature of an original writ.

Wright Justice: If the *latitat* be considered only as process to bring the party into court, then the rejoinder would be bad, but the plaintiff in this case by his replication seems to me to have made it the commencement of his suit, and therefore I think it may be taken to be in nature of an original writ.

Dennison Justice: The question is in this case, whether the tender comes too late; the defendant pleads he made it before the exhibiting the bill, and this is right; the plaintiff replies a *latitat*, and that the tender was not made before the suing out the *latitat*, rejoinder that there was no cause of action subsisting at the time of suing the *latitat*: to be sure a *latitat* is not strictly an original, but it may be considered as the commencement of the suit; so it is when pleaded to the statute of limitations, &c. I have some doubt whether the plaintiff's replication be good, because it is not material when the process issued; I speak this upon a supposition that the *latitat* is only process, and in this light the plaintiff seems to insist upon it; I think it may be considered in the nature of an original, being the commencement of the suit, and so the rejoinder is good.

*It seems as if it was
by Watts & Baker (20.
Car. 264.*

Foster Justice of the same opinion.

Judgment for the defendant *per tot' cur'*.

Goodright, of the demise of the issue of Matthew Hall,
versus Jacob Hall. In ejectment. B. R.

Devise.

THIS was a case reserved for the opinion of the court upon the words of a will. *Jacob Hall* the testator having two sons *Matthew* and *Jacob*, devised his lands to *Matthew* in fee, "Provided nevertheless that if *Matthew* shall die before me, then I do constitute and appoint by these presents my son *Jacob Hall* to enjoy the estate in the same manner as *Matthew* should have done, and also in case the said *Matthew* shall happen to die before the said *Jacob Hall*, he the said *Jacob Hall junior*, shall have and enjoy the estate as *Matthew* should have done."

Matthew survived the testator, leaving issue the lessor of the plaintiff, and living *Jacob* the defendant and brother of *Matthew*.

This case was twice argued at the bar; and it was contended for the defendant that (by the words, "And also in case the said *Matthew* shall die before the said *Jacob Hall*, he the said *Jacob Hall junior*, shall have and enjoy the estate as *Matthew* should have done;") the defendant was intitled to the lands; but *per curiam* the name *Jacob Hall* without the addition of *junior*, must plainly mean the testator, and the testator begins his will thus, "I *Jacob Hall*, &c." Judgment for the plaintiff.

Aubeer, trustee of the Marquis of Powis, *versus* Barker
in custody of the Marshal. B. R.

IT was moved on behalf of the plaintiff to amend his declaration, by adding two counts; this application to the court was made after the term next after the term in which the declaration was delivered, and after the defendant had pleaded thereto.

Amendment.
The court
will not give
leave to a-
mend a decla-
ration after
the term next
after the term
in which it
was delivered.

Wright Justice, (*absente Lee Ch. J.*) I take it to be the rule of the court, that a count cannot be added after two terms, and the term in which the declaration is delivered is always included; as to the case of the *Dutchess of Marlborough v. Widmore*, Hil. 4 Geo. 2. in B. R. the amendment in that case was allowed on a particular reason, for if it had not been there allowed, the action would have been lost by the running of the statute of limitations. *Dennison* and *Foster* Justice of the same opinion; and so the rule to shew cause why the amendment should not be made was discharged: but *N. B.* Another reason for discharging the rule was, because the defendant was in actual custody; and this was the third term he had been so; and this would be making a new declaration to keep him in prison so much the longer. 673 & 196

Langstaff *versus* Rain & Ux'. B. R.

SIR *Thomas Bootle* moved to discharge the wife out of custody; this was an action of assault and battery done by the defendant's wife, wherein there was a verdict and judgment for the plaintiff, and both the husband and wife were taken in execution: But *per curiam*, this matter has been determined that the wife is liable to be taken in the case of *Finch & Ux' versus Dudding & Ux* in Mich. term 19 Geo. 2. and they now refused to discharge the wife.

Husband and
wife both ta-
ken in execu-
tion in an ac-
tion for the
assault done
by the wife.
2 Stra. 1237.

The King *versus* Charles Ratcliffe, Esq; November,
21, 1746.

2 Ad. 266

Foster 40.
S. C.

A person convicted of high treason in the year 1716, brought in by habeas corpus, and the record of conviction being read, he is asked what he has to say why execution should not be awarded. He pleads he is not the same person convicted, issue is joined and found against him, and execution is awarded.

THIS day a *certiorari* being returned before the court of B. R. of the record of the conviction and attainder of one *Charles Ratcliffe* in the year 1716. for committing high treason (in levying war against his late Majesty King *George* the first in the year 1715.) before commissioners appointed for that purpose at the *Old Bailey* was read by the clerk of the crown; and also an *habeas corpus* directed to the constable of the *Tower of London* with the return thereof, which was a commitment of the prisoner then brought thereby to the bar (supposing him to be the same *Charles Ratcliffe* convicted as above) by the Duke of *Newcastle*, secretary of state, for the said crime of high treason, was also read; whereupon the person then at the bar supposed to be the same *Charles Ratcliffe* who was convicted in the year 1716. was asked by the secondary of the clerk of the crown to hold up his hand, (which he refused to do) and what he had to say why execution should not be awarded by the court, and done upon him according to the said judgment; the Attorney General *Ryder* having first prayed on the part of the crown that execution might be awarded against him.

Mr. *Ford* and Mr. *Toddrel* were assigned by the court of counsel with the prisoner at his request, and prayed time to consider what to plead and to rely upon, and desired to have a copy of the record and to see it: but *per curiam*, there is no instance or precedent for it, so refused it; but at their request the court ordered the same to be read over again by the clerk.

Per curiam, It is reasonable that counsel should have time to be instructed, but the crown must not be delayed, so take time till *Monday* next.

Ford for the prisoner: I desire it may not be understood that we shall be then ready to go to trial, but if we can give any good reason for putting it off, we shall be at liberty to do it; to which the court and the Attorney General conceded, so the prisoner was remanded, and ordered to be brought again to the bar on *Monday* the 24th of *November*, which he accordingly was; and being asked what he had to say, why execution should not be awarded against him upon the said record of conviction, he pleaded *ore tenus* that he was not the identical *Charles Ratcliffe* named in the record; the Attorney General *ore tenus* then replied that he was, and thereupon issue was immediately joined *ore tenus*; whereupon it was moved by the counsel for the prisoner, that a reasonable time might be allowed to him to prepare for his defence upon an affidavit made,

that

that two persons who were beyond seas, one of them at *Brussels* and the other at *St. Germans*, were material witnesses for him, as he believed, without whose testimony he could not safely proceed to make his defence, and that they will attend the trial, if a reasonable time be allowed for that purpose.

It was first objected to this by the Attorney General, that there was no title to the affidavit; that it ought to have been intitled *Between the King and Charles Ratcliffe*, whereupon the affidavit was altered, but yet not intitled, as it was objected it ought to have been: the alteration only was *Le Count de Derwentwater* maketh oath, that *A. and B.* now residing at such places abroad are material witnesses for this deponent in the trial of the issue joined between the King and this deponent, the prisoner at the bar, without whose testimony he cannot safely make his defence upon the said issue, and though the name of the cause was not written at the top of this affidavit, this was *prima facie* well enough to have it read; after it was read the King's counsel objected that it was not sufficient to put off the trial of this issue, which was only of a collateral fact, and according to all the precedents in the books such issues had always been tried *instantè* as soon as joined; but they said, that if the prisoner at the bar would swear that he was not the very identical person named in the said record of conviction, and who was tried and convicted in the year 1716, that might be a reason for the court to give him a longer time to prepare for his defence, as it was a matter which was wholly in his own knowledge, and if true, he might safely swear he was not that same *Charles Ratcliffe* mentioned in the said record of conviction, but the prisoner (after a long argument for him that he was not obliged by law to swear to his plea,) refusing to swear that he was not the same identical person who was convicted in the year 1716. the court immediately swore a jury to try the fact (which jury was ready waiting in the hall in order to try any issue that might be joined between the King and the prisoner.)

The two first witnesses called for the King, deposed that they knew *Charles Ratcliffe* in the year 1715. and that he was brother to the late Earl of *Derwentwater*, that they saw him in rebellion at *Hexam* in arms, that he had another brother *Francis*, who died before the rebellion in 1715. but these two witnesses said they had never seen the said *Charles Ratcliffe* since they saw him at *Hexam*, until about a month now past, when they saw him at the *Tower of London*, and that the person at the bar was the very same identical *Charles Ratcliffe*; but *N. B.* I did not hear these two witnesses, or either of them, swear that they or either of them saw the prisoner tried and convicted in the year 1716.

1 Sid. 72.
Rex v. Corbet & al'.
Keil. 13.
1 Lev. 62.

* So it was done in the King and Roger Johnson in B. R. Mich. 2 Geo. 2. N. B. Mr. Ratcliffe challenged the first juryman called, and insisted on his right to a peremptory challenge, but was over-ruled per cur', and so has been the modern practice. See S. P. C. 161. Co. Lit 157. 2 Hale 267. 1 Lev. 62. A 1 Keb. 744.

by what Ratcliffe had sworn perjury

A third witness was called by the King's counsel to prove the same thing, and although he swore he used to shave *that Charles Ratcliffe*, who was convicted in the year 1716. in *Newgate*, yet he now swore that he did not believe the prisoner at the bar to be the same person, and rather thought he was not *that* person.

The fourth and last witness for the crown was *Williamson* the lieutenant of the *Tower*, who swore that since the prisoner at the bar had been now lately in the *Tower*, he had declared he was the Earl of *Derwentwater*, and that he the prisoner had told him in what manner he made his escape out of the *Tower* in the year 1716.

Besides this evidence, two acts of parliament were read which mention the attainder of the late Earl of *Derwentwater* and the said *Charles Ratcliffe*, and some others of that family; this was the whole of the evidence for the King.

Then the counsel for the prisoner observed upon the evidence that the two witnesses who had sworn positively might be mistaken in the person of the prisoner, as they had not seen *Charles Ratcliffe*, whom they saw at *Hexam*, for 30 years together, and this might the rather be supposed because the third witness had refused even to swear that he believed the person at the bar to be the same *Charles Ratcliffe*, though he said he knew *the Charles Ratcliffe*, brother of the late Earl of *Derwentwater*; that none of the witnesses had proved that the prisoner at the bar was the same *Charles Ratcliffe* who was tried, or saw him tried and convicted in the year 1716.

After this the jury retired from the bar, and in half an hour brought in their verdict that the prisoner at the bar was the very same *Charles Ratcliffe* who was convicted of high treason in the year 1716. mentioned in the said record. whereupon Mr. *Ford* for the prisoner moved that he might have leave to plead an act of oblivion or general pardon of the third year of the late King; but *per* three Judges it cannot now be done, for the defendant has been asked what he had to say, &c. and he has relied upon his not being the same person mentioned in the record, and his plea comes too late, he having made his election what to rely upon, and the court cannot ask him twice what he has to say why execution should not be awarded against him, whereupon the court awarded execution, and this day fortnight was appointed by the court for that purpose at the prayer of the Attorney General.

N. The prisoner insisted he was an officer in the *French King's* army, and offered his commission, but the court refused to read it; he also insisted on a cartel between the two crowns now at war, but the court said they could take no notice of either.

N. The

N. The court said where any exception is in an act of pardon it must be pleaded specially, or they could take no notice of it.

N. The prisoner refused to hold up his hand, and did not do it.

Memorandum, The prisoner was beheaded on *Little Tower-hill* the 8th of *December* 1746. about one at noon, and behaved with great fortitude and Christian patience, *ut audiui*.

Smith *versus* Sibson. B. R.

THIS was an action of trespass, assault and false imprisonment, upon the general issue Not guilty, there was a verdict for the plaintiff at *Carlisle*, subject to the opinion of the court upon the following case:

Imprisonment.
One condemned by justices of peace in the penalty of 13 l. for harbouring run goods, is attached by their warrant till he pay the same, he offers to pay 13 l. but the officer detains him till he pays 5 s. 4 d. more for costs, this is false imprisonment.

An information was made before justices of peace upon oath against the plaintiff *Smith* for harbouring run goods contrary to the statute of *Geo. 1.* that the justices did adjudge that *Smith* did harbour such run goods, *viz.* Brandy, &c. and, according to the power given them by the statute, condemned him in the penalty of 13 l. and made out a warrant of distress to levy the same on his goods; and upon the back of the first adjudication by way of indorsement there was a further adjudication that the said *Smith* should pay (besides the said 13 l.) 5 s. 4 d. to the officers for their costs and charges, which was also put on the back of the warrant, which was directed to the defendant and the gaoler; they returned upon the warrant that the plaintiff had no goods whereupon the money could be levied, so the justices made out another warrant directed to the defendant who was a constable, and to the gaoler, to take the body of the plaintiff, and to convey the same to the county gaol, and there to deliver him to the keeper thereof, thereby requiring the said keeper to take him into his custody, and to detain him until he paid the sum of 13 l. It is further stated in this case, that upon this warrant the defendant attached the plaintiff, whereupon the plaintiff tendered and offered to pay him 13 l. which the defendant refused to accept, and refused to release the plaintiff out of custody unless he would pay the further sum of 5 s. 4 d. for costs, which the plaintiff refused to do, thereupon the defendant carried him towards the county goal the next day, but before they got to the goal, they were overtaken upon the road by one *Daniel Wilson*, who paid the 13 l. and 5 s. 4 d. for which a receipt was given to the plaintiff, and then he was discharged out of custody and not carried to goal.

Mr. *Henley* for the defendant objected, that although the justices had no power to adjudge, nor the officers any right to take any thing

for costs, yet that trespass and imprisonment was not the proper action in this case, but that wherever any man demands and receives more money than he ought to do, an action for money received to the use of the plaintiff is the proper action.

2dly, He objected that the defendant had no authority to receive any money, but was only to carry the plaintiff to prison, and that the receiving of this money was an indulgence to the plaintiff; as in the case of a *cap. ad satisfaciendum*, in strictness the sheriff is to take the body, and to have him before the King at *Westminster*, and has no authority to receive any money; and the act of parliament in this case directs that the money shall be paid to the sheriff.

Mr. *Crowle* for the plaintiff; the defendant has abused the authority given him by the warrant, which was only to take and detain the plaintiff until he paid the 13 *l.* after the plaintiff offered to pay the 13 *l.* the detainer was illegal, for the warrant says nothing of the 5 *s.* 4 *d.* neither have the justices power to give any costs; Mr. *Henley* seems to admit that an action for money received would lie, which is an admission that the money was unlawfully received, and if so, it was false imprisonment to detain him after he offered to pay the 13 *l.* and of that opinion was the whole court, and the *posse* was delivered to the plaintiff.

In answer to what was said that the defendant had no power to take the money, and to what was said about a *ca. sa.* Mr. Justice *Dennison* said, that as to this he would give no opinion, but that it seemed very hard to him that when the warrant in this case, or upon a *ca. sa.* is only for raising the money, it would be very hard to carry a man to goal after he offered to pay it, and said he thought that if a defendant taken by a *ca. sa.* offered to pay the money, and the sheriff refused to take it and still detained him, it would be false imprisonment, which was not denied by the rest of the court.

Wood *versus* Wenman. B. R.

Practice.
Hab. corpus
to remove a
cause brought
Nov. 6. De-
claration Nov.
12. defendant
not intitled to
an impar-
lance.

THIS was an action originally brought in the court of the sheriffs of *London*, which was removed by *habeas corpus* in B. R. the 6th day of *November*; upon the 12th of *November* the plaintiff delivered a declaration, and gave a rule to plead, and now Sir *John Strange* for the defendant moved for an imparlance, and insisted the practice was the same as if the action was originally commenced in this court; and cited *Salk.* 515. but *per curiam*, We will not put the plaintiff in a worse condition than he was in the court below, and therefore refused to grant an imparlance; so Sir *John* took nothing by his motion.

Adams *versus* Sparry. B. R.

THIS was an action commenced by bill, wherein the plaintiff having proceeded to final judgment, sued out a *fieri facias* returnable on *Monday* next after three weeks from the day of *St. Michael*, which was the effoin-day and the 20th of *November*, for *Michaelmas* day happened upon a *Monday*, and the full term began upon *Thursday* 23d of *November*; *Per curiam*, There is no such return in this term in suits by bill as *Monday* next after three weeks from the day of *St. Michael*, so the execution is void, and the goods taken thereby and in the sheriff's hands must be restored to the defendant. Sir *John Strange* for the defendant, Sir *Richard Lloyd* for the plaintiff.

An execution set aside because returnable on the effoin day in a suit by bill.

Ryall, Knt. and others, assignees of *Harvest* a bankrupt, *versus* *Larkin*. B. R.

ACTION on *assumpsit*, that defendant was indebted to *William Harvest* and *Jonathan Stevens* deceased, whom the said *William Harvest* survived, in 20*l.* for goods sold and delivered by the said *William Harvest* and *Stevens* in his life-time, and before the said *William Harvest* became a bankrupt, to the said *William Larkin*. *quantum valebant* for other goods, and an *in simul computasset* with *Harvest* and *Stevens* in his life-time, whereupon defendant was found in arrear 13*l.* 5*s.* 6*d.* and being so found in arrear promised payment, and concludes that the defendant hath not paid the said *Harvest* and *Stevens* in the life-time of the said *Stevens*, and before the said *Harvest* became a bankrupt, or to the said *Stevens* in his life-time since the said *Harvest* became a bankrupt, or to the said plaintiffs, the assignees, since the death of the said *Stevens*, to the damage of the said assignees of 20*l.*

The statute for setting off one debt against another does not extend to assignees under a commission of bankrupt.

This case is overruled as such plea held to be good.

dictum

Brough

law p. 133

French v. Smith (1744) 1 Atk. 220-230

Defendant pleads *non assumpsit*, and thereupon issue is joined; and further the defendant by leave of the court says, that the said assignees ought not to have or maintain their said action against him the said defendant, because he the said defendant says that the said *William Harvest* before he became a bankrupt, that is to say, on the 21st day of *April* 1740. at *Westminster* in the county aforesaid, by his certain writing obligatory called a bond, sealed with the seal of the said *William Harvest*, and shewn to the court of the said Lord the King now here, the date whereof is the day and year last mentioned, acknowledged himself to be held and firmly bound to the said *William*

Plea a set-off of a bond.

William Larkin in 100*l.* of lawful money of *Great Britain*, to be paid to the said *William Larkin*, when he should be thereunto required; and the said *William Larkin* in fact saith, that there is now due and owing to him the said *William Larkin* from the said *William Harvest*, upon account of the said writing obligatory, for principal and interest the sum of 64*l.* of lawful money of *Great Britain*, to wit, at *Westminster* aforesaid in the county aforesaid, which said sum of 64*l.* by the said *William Harvest* owing as aforesaid, exceeds the money from the said *William Larkin* due to the said assignees of the said *William Harvest* as aforesaid, to wit, the sum of 13*l.* 5*s.* and 6*d.* by occasion of the promises mentioned in the said declaration, namely at *Westminster* aforesaid, and out of which said sum of 64*l.* he the said *William Larkin* is willing and offers to pay the said assignees the whole of the said money due to them as assignees aforesaid, by reason of the premisses according to the form of the statute in such case made and provided; and this he is ready to verify; wherefore he prays judgment if the said assignees ought to have or maintain their said action thereupon against him, &c. to this the plaintiff demurred generally, and the defendant joined in demurrer.

This case was argued by Serjeant *Boote* for the plaintiffs, and by Mr. *Lawson* for the defendant. For the plaintiffs it was insisted, that the act of parliament for setting off one debt against another did not extend to assignees under a commission of bankrupt, and that in the present case there were not mutual debts, for wherever there are mutual debts there must be mutual remedies, and the defendant could have no action on his bond against the plaintiffs; and of this opinion was the court, and gave judgment for the plaintiffs.

Hilary Term

20 Geo. 2. 1746.

Dominus Rex *versus* Kinlock. B. R.

THE defendant was arraigned for committing high treason, being in the late rebellion, and pleaded Not guilty, and the jury were sworn, and his trial just coming on, the defendant insisted he was a subject of the King of *France*, and that he was advised to plead to the jurisdiction of the court, which he was now too late to do (having already pleaded in chief) without the consent of the Attorney General, who with great fairness and candour consented that the prisoner might withdraw his plea and plead to the jurisdiction of the court, and that a juror might be withdrawn and the jury dismissed, which was accordingly done; the Attorney demurred, and upon arguing this matter, the plea to the jurisdiction was over-ruled; whereupon the prisoner was a second time arraigned, and pleaded Not guilty, and another jury was sworn and brought him in guilty; and now in arrest of judgment the question was, whether a prisoner could be twice arraigned and a second jury sworn to try him; and by the opinion of nine judges against Mr. Justice *Wright* at *St. Margaret's Hill*, it was held that he was legally tried and convicted, for the first jury was withdrawn at his own prayer and by his own consent; but *Wright* argued *totis viribus* against it, and insisted strongly that no man can be put twice upon the trial of his life for one and the same crime, not even by his own consent. N. B. Upon the report of this matter to the king, his Majesty was graciously pleased to pardon *Kinlock*, *ut audiui*.

A traitor was arraigned twice, and two juries sworn to try him. See Mr. Justice Foster's report of this case 16, 23.

Thornton *qui tam versus* Gibson. B. R.

THIS was an *action qui tam* for killing hares, in which there were seven counts laid; the defendant pleaded the general issue last term, and now Mr. *Fawkes* moved to withdraw the general issue and to pay 5*l.* into court, and have it struck out of the declaration;

Money not allowed to be paid into court after plea pleaded.

PART I.

S f

ration;

ration; *sed per curiam*, This would be to overturn the practice of the court, which never gives leave to pay money into court after a plea pleaded; and discharged the rule to shew cause; Mr. *Clayton* for the plaintiff.

Easter Term

20 Geo. 2. 1747.

Between the Parish of *Austwick* and the Parish of *Clapham* in *Yorkshire*. B. R.

Settlement of poor. A parish apprentice may be turned over from A. to B. and from B. to C. and shall gain a settlement where he served the last forty days.

MICHAEL *Wilson* a poor boy, with the assent of two justices, was bound apprentice to *Thomas Jackson* of *Austwick*, who was tenant to *Thomas Jackson*, clerk of *Clapham*, who had agreed to indemnify *T. Jackson* of *Austwick*, who sent the pauper the next day to Mr. *Jackson* of *Clapham*, with whom he stayed about seven or eight weeks, and attended his sheep, and then ran away to his mother, whereupon Mr. *J.* of *Clapham* agreed the pauper should stay with his mother, and that he would pay her for the boy's board and cloaths, which he did for between two and three years; afterwards Mr. *Jackson* of *Clapham* agreed with the boy's brother, who was a mason, and lived at *Austwick*, that the boy should serve him for the remainder of the time in the indenture, accordingly the boy did serve his brother the mason at *Austwick* the remainder of the time.

By the order of two justices, which was confirmed by the sessions, the boy was removed to *Clapham*; and now Mr. *Clayton*, on behalf of the parish of *Austwick*, came to shew cause why both the orders should not be quashed, and objected that although one master might consent that his apprentice might go to another master and serve out his time with him, yet that a second master could not turn him over to a third, as has been done here, for if so, the apprentice might be turned over to forty different masters; and therefore he said the pauper was well settled at *Clapham*, where his last legal service was.

To

To this it was answered by Sir *John Strange* on the other side, and resolved by the court, that the statute which gives a settlement to a poor child who is bound by the parish, requires only that the apprentice should be bound by indenture, and thereby he shall gain a settlement where he last served by such indenture for the space of forty days; and though strictly speaking, in point of law, an apprentice cannot be assigned, or turned over by one master to another except by custom, as in *London*, yet it has always been held, that if an apprentice with his own consent is turned over with his indenture from one to another, and serves the second master forty days, he gains a settlement where he last served; and *The King and East Bergholt, Trin. 13 Geo. 2.* was cited, where a *pauper* was bound to *A.* who turned him over to *B.* who turned him over to *C.* at *East B.* where he served the last forty days; the court were of opinion he gained a settlement at *East B.* and this is in the very point; so the orders of the justices and sessions were quashed, because the *pauper* gained a settlement at *Auswick*, where he served the last forty days.

Spelman, Esq; a Barrister *versus*—B. R.

THE defendant moved to change the *venue* from *Middlesex* into *Hertfordshire* upon the common affidavit, and obtained a rule for that purpose; and now the plaintiff came and moved to discharge the rule, insisting upon his privilege of laying his action in *Middlesex* where the court of B. R. (where he attends) sits; and *per curiam*, The rule to change the *venue* must be discharged.

Venue.
A barrister has the privilege of laying the *venue* in *Middlesex* although the cause of action arise in another county.

Elton and Elton & al'. In Chancery.

SIR *Abraham Elton* by his will dated 26 Oct. 1727. devised in these words: "Item, whereas I have a right and power to dispose of the sum of 1500 l. being part of the money settled upon my late deceased daughter *Elizabeth*, the late wife of *Peter Day*, Esq; and which sum is now in his hands; now I do hereby give and bequeath the same, and all my right and interest therein, unto my granddaughter *Anna Elton*, the daughter of my son *Jacob Elton*, to be at her own disposal, pursuant to the request of my said late deceased daughter *Elizabeth Day*, in case she marries with the consent and approbation of my said son *Jacob Elton and his wife*, and in case of their deaths before that time, then with the consent and approbation of their trustees, and not otherwise."

A legacy given to a granddaughter in case she marry with consent, &c. she dies unmarried, the legacy never vested.

note and 130

Anna Elton the legatee survived the testator, but died at fourteen years of age, and unmarried.

The question in this cause was, whether the legacy of 1500*l.* ever vested in *Anna Elton*; for if it did, it shall go to the plaintiff her father, who is her administrator; if it did not vest, then it will sink in the residue of the personal estate of the testator, and the defendants who are assignees under a commission of bankrupt of the present Sir *Abraham Elton* the testator's grandson, (who was residuary legatee of *Dame Elton*, who was residuary legatee of the testator,) will be intitled to it.

It was insisted by Mr. *Attorney General* on behalf of the plaintiff that the legacy vested by the first part of the clause, and that the words annexed to it, "*In case she marries with the consent and approbation of my said son, &c.*" made a condition subsequent, which, by the act of God intervening, could never be performed; so that the legacy, which was once vested, could not be taken out of the legatee by the act of God.

On the other side it was contended that this legacy never vested at all, and so it was decreed.

Swinburne
257, &c.
God. Orph.
Leg. 452.

Ant. 136

Lord *Hardwicke*: I am of opinion that this is a condition precedent, but whether it be considered as a condition precedent or subsequent *that* will make no difference in this case, for as money legacies are always determined in this court according to the rules laid down by the ecclesiastical courts, which hold all conditions void, which are annexed to legacies in restraint of marriage, it makes no difference whether this be a condition precedent or subsequent in respect to the legatee's marrying with or without consent; the marriage is the event which must happen before the legacy could vest, and I am of opinion if the legatee had married without the consent required, that this court ought and would have decreed the legacy to have been vested, as the same was not given over to any other person.

Suppose the legatee had brought her bill to have been paid this money, the court could not have decreed it to have been paid to her, because it is given to her upon an event (*viz.* her marriage) which never happened.

The rule of the civil law in this matter is "*Dies incertus facit conditionem*;" the uncertainty of the time, or whether the event will ever happen, upon which event it is to be paid or given, is the reason that has always guided in similar cases to this, and if the event does never happen, the legacy never vests.

I am

I am also of opinion that the legatee in this case, being a *grandchild*, could not have had the interest of the legacy ordered to be paid to her for maintenance; but if it had been in the case of a *father* and *daughter*, and no other provision had been made for her, this court would have given her the interest.

If a legacy be given to a person to be paid at the age of twenty-one, though the legatee dies before that time, the legacy vests, and shall go to the legatee's representative, because the time is certain when the legatee would have been of *that* age if he had lived; but whether a single woman will ever marry or not, is wholly uncertain, therefore if the legacy be given upon her marriage, it can never vest until that event (which the testator had in view) happen.

The words, "*And not otherwise*," are very strong, and relate to the whole clause, and are as much as if he had said, "I do not give it her unless she marry with consent, &c." however she might have taken it, notwithstanding these words, if she had married even without consent.

In the case of *Atkins* and *Hiccocks*, (in which I took time to consider and look into all the books and cases upon this head, both in the civil and common law,) the case was, a father, by his will, gave to his daughter 200*l.* to be paid her at the time of her marriage, provided she married with consent, &c. the legatee died unmarried after the testator, and in that case I decreed that the legacy never vested; this is a stronger case than that at the bar, as being in the case of a *father* and *daughter*, for it is a debt of nature due from the *father* that he shall make a provision for his own *child*, but the debt is not so much due from the *grandfire* to the *grandchild*; and there is a great difference, for if a *copyhold* estate is devised to a *child*, and *no surrender* be made in the testator's life-time *to the use of his will*, this court will supply the want of a *surrender*; but if such *surrender* be wanting in the case of a devise of a *copyhold* by a *grandfire* to a *grandchild*, this court will not supply such defect, because the *grandchild* may be provided for by its own immediate parents, as was determined *inter Kettle* and *Townsend*.

In the case of a devise to a daughter of a copyhold, the court will supply the want of a surrender to the use of the will, but not in the case of the like devise to a grandchild.

If a legacy be given at twenty-one or day of marriage with consent, if the legatee live till 21, and afterwards marry without consent, yet she shall have it, though it be given over if she married without consent.

It is plain the testator intended to give this 1500*l.* to prefer his *grandaughter* in marriage, and it is very common for testators to make different provisions for their *daughters* or *grandaughters* in respect to their marrying and not marrying.

PART I.

T t

As

As to the words, "*To be at her own disposal*," those may as well mean that it should be to her own separate use when she marries, as any thing else; but there is no occasion to make any construction as to *disposal* one way or other, for the legacy never vested, because the legatee never was married.

The bill was dismissed without costs, as it was only brought to have the opinion of the court.

N. Mr. Brown for the defendant in the case of *Garbut v. Hilton*, at the Rolls, 26 Nov. 1739. the testator by his will in 1736. gave plaintiff 200 l. provided she married with the consent of her father and mother, or the survivor of them; plaintiff brought her bill to have the legacy raised and paid to her, and the question debated was, whether she must not be married before she was intitled to have the 200 l. and the Master of the Rolls was clearly of opinion there must be a marriage first.

Said *per* Lord Hardwicke, that the book of *Reports of Cases in Equity in Lord Nottingham's time* was of no authority.

Fogoe *versus* Gale. B. R.

After the venue is changed upon the common affidavit, the court will not alter it again upon an affidavit that the witnesses live in Scotland, and will not come so far as London, but are willing to come to Carlisle.

THE defendant having obtained a rule for changing the venue from *Cumberland* to *London*, upon the common affidavit that the plaintiff's cause of action, if he had any, arose in *London*, and not in *Cumberland*, or elsewhere out of *London*; it was now moved by Mr. Poole on the behalf of the plaintiff, that this rule might be discharged upon an affidavit that this was an action founded upon a promise made by the defendant to the plaintiff to indemnify him from any damages which might happen to him by reason of the plaintiff's agent or correspondent at *Glasgow* becoming bail or caution for the defendant in the *Admiralty court* there; that the defendant's witnesses lived in *Scotland*, and are willing to come to *Carlisle*, (to give evidence) but no further; and that as there was no process to oblige these witnesses to come to *London*, Poole prayed the action might be laid in *Cumberland*, as the next *English* county to *Scotland*. But *per curiam*, This was denied, for here is the common affidavit, and we cannot depart from the *practice*, which is the law of the court, and, as such, is the law of the land; and the plaintiff took nothing by the motion. *Ford pro def.*

Rex *versus* Hunter. B. R.

JUDGMENT was regularly signed in this (*being a criminal*) cause, and it was moved by Mr. Crowle and Mr. Ford for the defendant, to set it aside upon payment of costs, pleading the general issue, and taking short notice of trial, as is often done in civil suits; but denied *per curiam*, for it never was done

A regular judgment in a crown cause cannot be set aside on payment of costs.

Howell qui tam, *versus* James. B. R.

THIS is a rule to shew cause why the plaintiff should not have leave to amend his information against the defendant for killing a hare, by altering the parish where the same is laid to be done. Mr. Evans on shewing cause objected, that there might be a conviction before the justices for the same fact already, in the parish where the informer wants to lay it; but it was answered by Mr. Phillips for the plaintiff, nothing of *that* appears to the court, and it is now three months since the fact was done, and if we cannot amend it the defendant will escape the prosecution; and this is like the case of the *Dutchess of Marlborough v. Whitmore*, where the court allowed the plaintiff to amend in an extraordinary case, which if the court had not done, the statute of limitations would have run, and the plaintiff have lost all remedy. And the rule now was made absolute to amend the information.

Information for killing a hare amended.

Trinity

Trinity Term

21 Geo. 2. 1747.

Rex *versus* Harvey. B. R.

Every law made introducing a capital punishment must be construed strictly.

IN the last term the defendant was brought to the bar by an *habeas corpus*, the return whereof sets forth, that he was committed as a felon convict upon the late *stat.* 19 Geo. 2. for not surrendering himself within forty days after publication in the *Gazette*, of an order by the King in council for him to surrender upon a charge of being armed on the sea-coast in order to be aiding and assisting in running of goods.

A suggestion of all the facts and requisites in the act of parliament was entred upon the roll by way of *dat' cur' intelligi, &c.* to which the defendant pleaded by denying all the facts therein alledged, and the *Attorney General* (then present) joined issue, and the prisoner was then remanded, and was ordered to be tried the first *Monday* in this term.

The defendant being now upon his trial, insisted, that among other provisions the statute requires the sheriff to proclaim the order of council in two market towns *near* the place where the offence was committed; that it appeared upon the record that the proclamation was made at *Hadleigh* 42 miles distant from it, at *Ipswich* 30 miles distant, and at *Lestoff* 6 miles distant; and it was proved that there were five other market towns at 6, 8 and 14 miles distant from the place where the offence was committed, and so the defendant objected that the order had not been proclaimed at the market towns *near* the place, and therefore insisted he was not legally convicted. In answer to *this* it was proved that *Hadleigh* was a town in the same parish where the defendant resided, and therefore the *King's counsel* said the proclamation made there was more advantageous to the defendant, and that the statute ought to have a liberal construction as to this fact, which was only to give notice to the party to appear. But *per curiam*, The letter of this penal law ought to be complied with, and no proclamation can be allowed which is not warranted by the statute as the present seems (to us)

not to be; for there can be no rule more certain than that every law introducing a capital punishment ought to be construed strictly

Thrale *versus* Cornwall. B. R.

ACTION of debt for rent brought by the assignee of the lessor against the lessee in the county of *Middlesex*, of lands in *Surry*; upon demurrer it was objected for the defendant, that an action of debt in this case is at the common law, which always annexes the rent to the reversion, is always local, and must be laid in the county where the land is; and the distinction is between *debt* and *covenant*, for *covenant* being founded on the privity of contract, is transitory; at common law covenant did not lie for the assignee of the reversion against the lessee, but it is given by the *stat.* 32 Hen 8. c. 34. And so it was held *per curiam*, who said that 1 *Saund.* 237, 238. where the difference was taken, has always been holden for good law. And judgment was given for the defendant.

1. *Imp. Cases Temp.*
Debt for rent *Geo. 2. 109*
by the assignee of the lessor is *S.C.*
local, but covenant is transitory. *2 B. & A. 105*
3 B. & A. 392
Vide 3 Rep. 22, 24.
2 Lev. Hob. 37.
Cro. Car. 183.

note Carth. 182.
Mayeroff v. Lunden v. Cole
2 at 7 T. R. 583
L. J. Miller Rep. 431

Hawes and Hawes. In Chancery.

LORD Hardwicke Chancellor: There are two questions made in his cause, 1st, The first arises upon the words of the will of the grandfather *Andrew Hawes*, which are, "I give and devise all my estate in D. unto my four children A. B. C. and D. (who were his younger children) their heirs and assigns for ever, equally to be divided between them share and share alike, as tenants in common, and not as jointenants, with benefit of survivorship." The question is, whether the four children take as tenants in common generally, or as tenants in common with some sort of benefit of survivorship?

It is true that, in this court, *jointenancies* are not favoured, because they are a kind of estates that do not make provision for posterity, neither do I take it that courts of law do at this day favour them; although Lord Coke says that *jointenancy* is favoured because the law is against the division of tenures, but as tenures are many of them taken away, and in a great measure abolished, that reason ceases, and courts of law incline the same way with this court. Another rule is, that where there are contradictory words in a will, the court makes a reasonable and uniform construction, and will reject such words as are absurd and contradictory to the intent of the testator.

The words, "Equally to be divided" in a will, make a tenancy in common; here is also added, *As tenants in common and not as jointenants* which are very strong words: but then it is also

What words in a will make a tenancy in common, and yet there shall be a survivorship if any of the devisees die under age.
1 Wms. 96.
Stringer v. Phillips at the Rolls 1730.
cited in 1 Wms. 96.
Eq. Ca. Abr. 292.
2 Vern. 559.
Prec. in Canc. Salk. 226.
Popham and Bampfild, 2 Ro. Ab. 90.
P. 5.
2 Wms. 20, 54.
Cro. Eliz. 695.
Ca. in Queen Anne's time 108. of no authority.

PART I.

U u

said

said "*with benefit of survivorship*, which last words create the difficulty in the case, that is to say, to know at what time the testator intended this benefit of *survivorship* should take place; and this may be explained by another part of his will, where he plainly points out a *survivorship* among the children themselves as to his personal estate, where the words are, "*If any of my younger children die under age and unmarried, then I direct that the share of him so dying shall go to the survivors*;" then he comes to this devise of his real estate to his said four younger children, but it is true he does not say with *like* benefit of *survivorship*; I think it is natural to consider this as a fund or provision for these four children, and that he meant, if any of them should die before 21 or unmarried, that the share of the child so dying should go among the other children; and I am of opinion that C. dying under age, his share did survive to the other three, and shall not go to his heir at law.

The second question arises upon the words of the will of the father *Harwood Hawes*, wherein he devises all his estate to Mr. *Shoafe* in fee, upon trust that he, his heirs and assigns, shall sell and dispose of it, or of so much thereof as is necessary, and raise money to pay his debts; "*And the residue of my estate which shall remain unsold, I direct my said trustee to convey to my three children A. B. and C. and their heirs, as tenants in common, and to the survivor and survivors of them and their heirs, when he, she or they shall attain their age of 21. and the rents and profits in the mean time to be paid towards their education*;" one of the children died under 21 and unmarried; the question is, whether this estate vested immediately upon the death of the testator, or not till they would respectively attain the age of 21. and whether they are to take in common?

Indeed when the trustee comes to convey, he must convey to each a divided share, as they would then take as tenants in common; but notwithstanding this, I am of opinion that if any of them die one day under age, the share of such child must survive; for I consider this as one fund for the provision of all the *three*, and it is the same thing as if the testator had said, "I direct the rents and profits shall be paid towards maintenance of my three children during their minority, and that my trustee do convey equally to them when they respectively are of age."

It was objected at the bar, that if *one* of the children had died under age, and the survivors had been minors, what must have become of that third part if it could not descend to the heir at law? I answer, it was one fund or provision for all the *three*, and that *third* of the profits must have gone to the survivors; none of them before he or she should become of full age could have called upon the trustee

trustee to convey. In the present case, one of them died under age, and the other two are now of full age, therefore the conveyance must be of a moiety to each of them; and decreed accordingly.

Finch and Wilson an attorney of C. B. In Error.

WILSON sued *Finch* in C. B. by an attachment of privilege, and in Michaelmas term 17 Geo. 2. declared that *Finch* was attached by writ of privilege, &c. to answer him in an *assumpsit* upon a promissory note; *Finch* pleaded *non assumpsit* & *non assumpsit infra sex annos*; issue was joined upon the first plea; and to the second plea *Wilson* replied that he sued out a writ of privilege the 7th day of July in the 16th year of his present Majesty, and that the said *Finch* did make such promise within six years next before the suing forth the said writ of privilege; to this replication there was a demurrer, and joinder in demurrer; there was a verdict for *Wilson* the plaintiff below upon the issue to the country.

An attachment of privilege in the Common Pleas is in the nature of an original writ, and when it is replied to save the statute of limitations, it is sufficient to shew the teste of it without continuances till the declaration.

2y. for in *Carth. 144.* an attachment of privilege must be returned & continued & so *Willes 255* & so it has been determined in *Pact. Kinsey v. Howard.*

The demurrer was argued twice in the Common Pleas, where it was objected to the replication, that it did not appear thereby, when the attachment was returnable, nor that it was ever delivered to the sheriff or returned, and that four terms intervened between the teste thereof and the term the declaration was of, and therefore there ought to have been continuances of this writ of privilege; but the court of Common Pleas were of opinion that an appearance to process cures all errors and defects therein, and gave judgment for the plaintiff below.

A writ of error was brought upon this judgment, and the general errors were assigned; and in Hilary term 18 Geo. 2. this matter was argued by serjeant *Bootle* for the plaintiff in error, and serjeant *Dra-per* for the defendant; and again in Michaelmas term 20 Geo. 2. by Sir *Thomas Bootle* for the plaintiff in error, and Mr. *Poole* for the defendant.

It was insisted that the judgment was erroneous, for that there are five terms between the teste of the writ and the defendant's appearance; and that in *mesne process* to attach the body, the writ at furthest must be returnable the next term after the teste thereof, or if a term intervene between, it is void; and the reason is, because the party may not be unlawfully hurt by a long imprisonment; there is a difference between *mesne process* and *executions*. 2 *Ld. Raym.* 775. And where a writ is a nullity, it shall not prevent the statute of limitations from running. 2 *Ld. Raym.* 772. 1 *Salk.* 421. *Farrall* 5. S. C. The plaintiff below has gone five terms back, and by the same rule he may go back five years, which would wholly destroy the law as to returning and continuing of process.

3 *Keb.* 608.
1 *Lutw.* 256,
279.
1 *Ld. Ray.*
432.
Carth. 144.
Salk. 427.
Farrall 5.

Shower 166,
366.

For the defendant in error it was argued, that an attachment of privilege in the *C. B.* is in nature of an original writ, and if an original writ is replied to the plea of the statute of limitations, it is sufficient to shew the *teste* of it when it issued without any continuances, according to the case of *Whitehead and Buckland*, *Style* 373, 401. but if a *latitat* or a common *clausum fregit* be replied, it must be shewn that it was continued properly to make it the foundation of the suit. *Carth.* 234. and of that opinion was the court, after time taken to consider; and the judgment was affirmed.

23

Elliot, Executor of Taylor, who was the second husband of Elizabeth, who was one of the daughters of John Boover a freeman of London, Plaintiff, *versus* Benjamin Collier and Mary his wife, who was the other daughter of John Boover, Defendants.

234 ad. 273

The husband's right of administration to his wife is transmissible to his representative, and shall not go to her's.

THIS was a bill in Chancery brought by the plaintiff to have an account of *John Boover's* personal estate, and to be paid the orphanage share thereof which *Elizabeth* was intitled to, wherein it was insisted by the plaintiff, that as *J. Boover* died leaving no wife, but only two daughters, that *Elizabeth* was intitled by the custom of *London* to a moiety of one half of *Jo. Boover's* personal estate, for by the custom of *London* a freeman leaving children only, has power by will to dispose of no more than one half of his personal estate.

The defendants by their answer insisted that *J. Boover*, about 24 years ago, gave *Elizabeth* away in marriage to her first husband *Thomas Filmore*, presented to her a gold watch, and fitted her out very well in cloaths; they also insisted (and attempted to prove by a hearsay of the father) that he gave her 100 *l.* and that this was an advancement in marriage, and that as the very exact portion did not appear under the hand of the father, *Elizabeth* was barred of her orphanage share; that the first husband of *Elizabeth* became insolvent, and her father took her home again to his own house, where she lived for some time and took care of his family, then *Filmore* her first husband died, and her father made his will, wherein he expressed himself, that if *Elizabeth* should insist upon her orphanage share, that she should pay 25 *l.* per ann. for her board. Then *Elizabeth* married *Taylor* her second husband; soon after *J. Boover* the freeman died, afterward *Elizabeth* died, and eight days after her death *Taylor* her second husband died, not having taken out administration to her; and now *Elliot*, as executor of *Taylor*, brings this bill.

Lord

Lord *Hardwicke*: There are two questions made in this case; First question.
 1st, Whether as *Taylor* never took out administration to *Elizabeth*
 his wife, her orphanage share ever vested in him, so as to be trans-
 missible to his executor the plaintiff?

2^d, Whether *Elizabeth* has been so advanced by her father in Second ques-
 marriage as to be barred of her orphanage share? tion.

As to the first, The spiritual courts are bound to grant admini- As to the first.
 stration to the next of kin; the husband is next of kin to his wife,
 and *Taylor* surviving his wife was well intitled to all her personal
 estate, and though he did not take administration, yet the right to
 her orphanage share vested in him, and is transmissible to his exe-
 cutor or administrator. The husband is not mentioned in the *stat.*
of Car. 2. of distributions, his surviving his wife is not a provision
 within that statute; no person but the husband can be intitled to
 the personal estate of the wife, unless by some agreement; so he
 might have had administration, and the whole would have been his
 own, no body could have shared with him; indeed there are several
 cases wherein the spiritual court is obliged to grant administration
 under the *stat. Ed. 3.* and yet such administrator is only a trustee. If the hus-
 If the wife in this case had survived her husband, every part of the band does not
 personal estate of her father which she had been intitled to, would reduce the
 have gone to her next of kin, except only such part thereof as the wife's right
 husband, while married to her, had reduced into possession; but into possession,
 notwithstanding this, there are many cases in this court where the and she sur-
 right to the personal estate of an intestate does not follow the right vives and then
 of administration. dies, her re-
presentatives
shall have it.

As to the second question, I am of opinion that this not an As to the se-
 advancement of *Elizabeth* in marriage, and that she is not barred of cond.
 her orphanage share; for suppose her father had given her the 100*l.*
 yet as it appears in the cause his whole personal estate amounted to
 2000*l.* this could not be deemed an advancement in marriage; be-
 sides, it appears in the cause she was violently in love with her first
 husband, and her father must either have consented to *that* match
 or have buried her, so it is plain the father did not prefer her in
 marriage; so there must be a decree for the plaintiff, that an ac-
 count may be taken of the personal estate, and after allowing to the
 defendants what the master shall think reasonable for *Elizabeth's*
 board while she was with her father, that the rest of the orphanage
 share of *Elizabeth* be paid to the plaintiff

Quære, the case of *Hole* and *Doleman* at *Doctors Commons* in
Michaelmas term 1736. cited by the Solicitor General, who said he
 was of counsel in it, and that it was therein determined by the
 Judge and all the Doctors (not in the cause) that the husband's

right of administration to his wife is not transmissible to his representative, but that it goes to the next of kin to the wife. *Vide Lewin v. — — Eccles and Freeman, Stanhope and Stanhope.*

The Vicar of Kellington in Yorkshire *versus* The Master and Fellows of Trinity College in Cambridge, Rectors, their Lessee, and two occupiers of lands in the parish. In the Exchequer.

Survey of a religious house taken in 1563. allowed good evidence to prove a vicar's right to small tithes.

LORD Chief Baron *Parker*: This is a bill brought by a vicar for the tithe of *agistment* of barren cattle, setting forth that he is intitled by endowment, prescription, usage or otherwise, to all *small tithes* within the parish; and, to make out his right thereto, produced in evidence an antient survey (from the first-fruits office) of the possessions belonging to the nunnery of without the walls of *York*, to which this rectory was appropriated, which survey was taken in the year 1563. upon the dissolution of monasteries *tempore H. 8.* whereby it appeared what species of tithes belonged to the *rector*, and what to the *vicar*, *viz.* corn, grain and hay to the *rector*, and to the *vicar* wool, lamb, and *all other small tithes*; also another survey taken by the college *anno 33 Eliz.* was produced, which agreed with the former. It was objected that it does not appear by what authority the survey in the year 1563 was taken; the answer is, that these surveys have always been allowed as proper evidence, and to be read, notwithstanding the commissions under which they were taken be lost; it has also been objected, and it appears in proof that *agistment* tithes have been paid to the *rector* for 50 years last past: In answer to this it is proved that before *that* time *viz.* 60 years ago, this species of tithe was paid to two *vicars*; so that I am of opinion here has been an usurpation upon the *vicar* for 50 years last past. If an *endowment* appear, *that* is the rule we are to go by, if it do not, *usage* is the rule, therefore if there had not been this written evidence, (to be sure,) the payment to the *impropriator* for 50 years would have been very strong proof for him against the *vicar*; but on the other side here is a record which proves that the *vicar* is intitled to *all small tithes*, and at this day there is no doubt but that *agistment* tithe is a small tithe; and the court decreed in favour of the *vicar*.

Agistment is a small tithe.

Hay & Ux' *versus* Kitchin & Ux'. B. R.

ASSAULT and battery; defendants plead *son assault demesne* tried before justice *Foster*; the defendant failed in proving his plea, then the plaintiff went on in his evidence and proved an assault made the 27th of *Octob.* and the *memorandum* in the record is of the first day of *Michaelmas* term, being the 23d of *Octob.* but the day of the assault laid in the declaration is the 19th of the same *October*. It was insisted at the trial that the plaintiff ought to be nonsuited, as not having proved any assault before the commencement of the suit; but the judge refused to call the plaintiff, and there was a verdict for the plaintiff, subject to the opinion of the court. The point was now spoke to, by serjeant *Poole* for the defendant, and Mr. *Bennet* for the plaintiff. *Per curiam*, The defendant by his plea admits an assault, which is laid before the day of the *memorandum*, and the plaintiff's proving an assault was unnecessary; if this had been upon the general issue, the court would have let the plaintiff have mended his bill by making a special *memorandum*; and this has been done where the day laid in the declaration was after the *memorandum* in *Bennet v. Mainwaring*, 7 & Geo. 2. The *postea* was delivered to the plaintiff.

Assault and battery, son assault, &c. proof that the assault was on a day after the commencement of the suit.

Hooker Executrix *versus* Quilter. In Error. B. R.

ACTION upon the case upon four several promises: 1. An *indebitatus assumpsit* for the use and occupation of a house of the plaintiff's testator in his life-time, and the promise laid to be made to him; 2. A *quantum meruit* for the like; 3. An *indebitatus assumpsit* for the use of another house of the testator for the time incurred since his death, and the promise laid to be made to the plaintiff as executrix; 4. A *quantum meruit* for the use of another house of the plaintiff, without naming her executrix; judgment by *nil dicat* in C. B. writ of inquiry and intire damages assessed; now in error upon the common errors assigned, Mr. *Ford* for the plaintiff insisted that a man cannot sue as executor and in his own right in one and the same action; and that though this is a judgment by default, and not taken advantage of by demurrer, yet the court is obliged *ex officio* to abate the writ, for that the damages are intire, and the plaintiff cannot distinguish how much she is to have as executrix, and how much in her own right; and this being against a rule or maxim in law, is not helped by any of the statutes of jeofailes.

Executrix sues for a debt due as executrix, and in proprio jure, the writs shall abate.

2 Stra. 1271. S. C.

Mr.

Mr. *Comyns* for the defendant in error insisted, that although this might have been ill upon a demurrer, yet it is not so upon a judgment by default; and cited 2 *Lev.* 110. and 1 *Sid.* 218. to shew the court will go as far as possible to support a judgment; he also urged that the court would presume the fourth count to be brought by the plaintiff as executor, as she was named such in the beginning of the declaration; and cited 1 *Ld. Raym.* to shew that the court have presumed against the very words of a record, where it is said, "money received for the use of the defendant, in-
"stead of the plaintiff.

Lee Chief Justice: It is not disputed but that a plaintiff in a declaration cannot make a demand for any thing due *jure alterius* & *in proprio jure*; and so is the case of *Rogers v. Cooke*, *Carth.* 235. *Salk.* 10. S. C. there was not in *that* case any demurrer (for *Salk.* in *that* is wrong) but the defendant pleaded a frivolous plea, when the court saw the record they abated the writ, because there appeared too incompatible demands in one and the same suit, and the true reason was on account of the damages which were intire, and the court could not say what damages the plaintiff was to have as *administrator*, and what *in proprio jure*; and this is a declaration against a rule of law, and is not helped by any statute; neither do I think a verdict would have helped it, for a verdict only helps upon a supposition the matter was proved before the judge who tried the cause; and supposing all the matter in this declaration to have been proved, yet the two demands cannot be made in one action.

Wright J. spoke to the same effect.

Dennison J. No doubt but this would have been bad upon a demurrer; and I think it is also bad upon a judgment by default, but am in doubt whether it might not have been helped after a verdict, because when an executor sues and declares for rent both in the lifetime of the testator and after his death, *there* the executor may sue without naming himself executor; and if he names himself executor it is surplusage, and he shall pay costs where it is for rent in his own time as executor.

Foster J. If the plaintiff's naming herself executrix in the beginning of the declaration in this case does not extend to the fourth count, I think the declaration is bad, and concur with my brothers. Judgment reversed.

Keeling *versus* Newton. B. R.

THE declaration was left in the office *de bene esse*, upon process returnable the *second return*, with notice indorsed upon it to appear and plead in eight days; and the like notice was given to the defendant that the declaration was left *de bene esse* as aforesaid; the defendant's attorney filed common bail in due time, and tendered the general issue with a notice of a *set-off*, which the plaintiff's attorney refused to accept, because the defendant's attorney had not taken the declaration out of the office and paid for it, and signed judgment, which was held to be regular *per totam curiam*, upon the Master's report, and upon consulting the clerks of the papers and others. *Vide Reg. Cur. anno 1700.*

Practice.
Defendant must take the declaration out of the office and pay for it, before the plaintiff's attorney is obliged to receive his plea.

Hallett *versus* Hallett. B. R.

RULE to shew cause why the plaintiff should not have leave to amend his declaration upon payment of costs, by altering the word *Middlesex* in the margin and putting in there the word *Dorsetshire*, and by striking out the word *Dorchester* throughout and inserting the word *Westminster* instead thereof. Mr. Lacy for the defendant said he had pleaded, and this was a motion in effect to change the *venue* by the plaintiff after plea pleaded, and was of the first impression.

Motion by the plaintiff to amend his declaration by changing the venue after plea pleaded.

Mr. Burton *è contra*: This is an action upon a note, the defendant has pleaded a *tender* as to part, and *non assumpsit* to the rest; and if the amendment be made, the defendant need not plead *de novo*. 2 *Keb.* 154.

The court inclined to make the rule absolute, but took time to consider.

Michaelmas Term

21 Geo. 2. 1747.

1 Brad. 874 11 ad. 571

Brown *versus* Best. B. R.

Special action
for diverting a
watercourse.

THIS is a special action upon the case for diverting a watercourse, wherein the plaintiff declares upon his own possession of the place through which the water used to run, and sets out the course thereof, and that the defendant has made this obstruction, *viz.* that he has digged two pits deep and wide, and made two ponds partly in and near the said course, and diverted the water into these pits, and made dams and banks to the ponds, by which the water has been diverted in its antient course, and a great part of it sunk into these pits and ponds, so that little or no water has come to the plaintiff's grounds, whereby the plaintiff is damaged.

If one has antiently pits which are replenished by a rivulet, he may cleanse them, but cannot change or enlarge them.

The defendant pleads that all the water-springs in his ground, and that the two pits have been there time out of mind for the use of water for the meadows and cattle, and that at the time when, &c. these pits were choaked up with mud, and therefore he dug two large pits, and made dams and banks, which he insists it is lawful for him to do, and denies that any other water has been obstructed.

The plaintiff replies, protesting that the plea amounts to the general issue, and says that the defendant did this of his own wrong, and concludes with an averment; the defendant demurs, and plaintiff joins in demurrer. This case was argued in *Trin.* term 19 & 20 Geo. 2. by Mr. Cox for the defendant, and Mr. Poole for the plaintiff. And in this term the court gave judgment.

Lee Chief Justice: I am of opinion that the declaration is very good, and that in the case of a watercourse which is *jure natura*, this is the best way of declaring, for the plaintiff being possessed of the place, declares that the water *currebat* through that place time out of mind, and that the defendant had obstructed it; and I think the defendant by his plea has not at all denied the plaintiff's having

having such a watercourse, but says that it took its rise in his the defendant's ground, that the water runs through part of his ground, that there were two pits immemorially, and acknowledges he has enlarged the pits and made the obstruction laid in the declaration; this really amounts to a confession of the plaintiff's action, for although there have been pits in the defendant's ground time out of mind, yet he cannot enlarge them, but they must remain as they always have been, and so is the rule both in the common and civil law. *Hetley 34. Duncomb v. Sir Ed. Randall. Dig. lib. 3. sec. 15.* The defendant indeed might have cleansed the pits, keeping them as they were before, but cannot enlarge them; if I have a right from usage as *currere solebat*, I have the *right* in such a manner as the *usage* has been; as to inconvenience to defendant it is nothing, and might be alledged in every such case as this; and the maxim *id. Carth. 116. 117.* *Hetley 34.* is exactly applicable to the present case, *Sic utere tuo ut Poph. 166. ne laedas alieno.*

Dennison Justice: Whatever the precedents may be in regard to *watercourses to mills*, yet as to *natural watercourses* this is the most proper way of declaring; as to the *plea*, it seems to be calculated not to come to the merits, for I cannot see it was possible for the plaintiff to take any issue upon this plea, though I cannot properly call it a prescription, yet it has the same effect, for these pits, &c. are said to have been time out of mind. Defendant says that altho' there was a watercourse through your land, yet in my land there have been two large pits for watering cattle, &c. and for other purposes for the occupation of my land; the defendant ought to have said for *what* purposes; there is a direct allegation that these pits have been time out of mind, and that all the water except what was stopped for his purposes, was not hindered, so that really he has in effect alledged a right to keep all the water if he pleases; and this plea can only amount to the general issue, for if it had appeared upon the general issue that the defendant had a right to all the water, the plaintiff must have been nonsuited; besides, the defendant admits he has enlarged these pits, which is certainly contrary to law, and if the defendant has any *prescription*, he ought to have traversed the *plaintiff's prescription*, according to the case of *Murgatroyd v. Law, Carth. 116.* And a *watercourse* is a quite distinct thing from the land. *Poph 166. Wright and Foster Justices*, of the same opinion. Judgment for the plaintiff.

Denn

Denn of the demise of Warren *versus* Fearnside. B. R.

Habendum from the day of the date of an estate for three lives, is a freehold to commence in futuro, so is void
3 Salk. 625.

He who enters under a void lease and pays rent is not a disseisor, but tenant at will.

Tenant at will has no estate that he can forfeit for treason.

Lease to a papist.
Q. Whether void.

Possession of tenant at will is the possession of the lessor.

Stat 11 & 12
W. 3. c. 4.

EJECTMENT. Special verdict finds that *Dorothy Talbot* being seised of the lands in question in fee, by *lease and release* in 1678. in consideration of a marriage to be had between her and *Edward Warren*, conveyed the same to trustees to the use of herself for life, then to *Edward Warren* for life, remainder to the heirs of her body begotten by *Edward Warren*, remainder to *Edward Warren* in fee, with power to *Edward*, if he survived his intended wife, to make leases for 21 years, or for three lives in *possession*, and not in *reversion*; the marriage took effect, and they had issue three sons *John*, *Edward*, and *Talbot*; *Edward* the father survived his wife, and in 1704. demised the premises in question to *John Plessington* for three lives, *habendum* from the day of the date thereof at the usual rent of 17 s. 2 d. which *lease* was executed in the presence of two witnesses according to the power, by virtue whereof *Plessington* entered and was seised, and continued to be seised thereof, and paid rent in the year 1715. till he was attainted of treason, having been in the rebellion, and that he was a papist at the time of the demise and at the time of his attainder; that *Plessington* was indicted and outlawed for high treason in 1716. and was thereupon attainted; that *Edward Warren* the father died in 1718. that *John Warren* his eldest son died in 1729. without issue; that *Edward Warren* the second son died in 1737. and left issue *George Warren*, the lesser of the plaintiff, who is the heir at law in tail; that no claim was made of the premises by any of the family of *E. Warren* before the commissioners of forfeited estates, by the *stat. 1 Geo. 1. c. 50.* under which the defendant claims; and whether upon the whole matter, &c.

This special verdict was argued by Mr. *Starkey* for the plaintiff, and Mr. *Ford* for the defendant, in Michaelmas term 18 Geo. 2. and several other times by other learned counsel at the bar; and now the court gave judgment for the lessor of the plaintiff.

And 1st, It was resolved by the whole court, that the demise to *Plessington* being *habendum* from the day of the date, was of a freehold to commence *in futuro*, and therefore void. 2^{dly}, That *Plessington* entering and enjoying the premises under this void lease was not a *disseisor*, but a mere tenant at will, for it is found he paid rent. 3^{dly}, That a tenant at will has no estate that he can forfeit to the crown, for he has nothing at his own disposal, and the act of treason determined his tenancy at will. 4^{thly}, That the lease to *Plessington* was also void for another reason, (was held by all except Justice *Foster*), viz. because he was a papist. 5^{thly}, It was resolved that

that the possession of *Pleffington* (the lease being void) was the possession of *Warren*, so that as the estate was never out of the possession of the family of *Edward Warren*, there was no occasion to make any claim before the commissioners under the *stat. 1 Geo. 1. c. 50.*

Foster Justice dissented, as to the lease being void, the lessee being a papist; he said the words *void, &c.* in the corporation act, are considered only as voidable; so in the case of a purchase by a villain, he may take for the benefit of his lord, and he thought that a papist might take for the benefit of the crown in case he should commit treason; but as to all the other points he agreed with the rest of the court, and that judgment should be for the plaintiff.

Law qui tam, &c. *versus* Worrall. B. R.

INFORMATION on the *stat. 8 Geo. 1.* for killing game; the defendant pleaded a conviction before a justice of peace for the same fact, and the defendant had judgment for want of a replication, and obtained a sidebar-rule for costs, which Mr. *Evans* now moved to set aside, alledging that the statute did not give the defendant costs, and that the *stat. 18 Eliz.* does not extend to the subsequent statutes. But *per cur'*, The words of the *stat. 18 Eliz. c. 5.* are as general as any statute relating to costs, and seem to extend to every informer upon any penal statute who shall delay his suit, discontinue, be nonsuit, or shall have the matter pass against him by verdict or judgment, such informer shall pay costs; and there have been a great number of cases like *this*, where costs have been given; and cited *Carter qui tam v. Tooting, Mich. 12 Geo. 1.*

Costs for the defendant, for want of a replication, on an information for killing game.

Jeffereys versus Walter. B. R.

RULE for the plaintiff to shew cause why the defendant should not have leave to withdraw his plea of *non est factum* to a bond, and to plead the statute of gaming, upon payment of costs, taking short notice of trial, and giving judgment of this term in case there be a verdict for the plaintiff, grounded upon an affidavit that instructions had been given by the defendant to his attorney to insist upon the statute of gaming; and the attorney apprehending that he could give that statute in evidence on *non est factum*, did not plead the statute specially. It was objected for the plaintiff that this had never been done, that the defendant had been guilty of an effectual delay by exhibiting a bill in Chancery against the plaintiff for a discovery, relief and an injunction, to which he had put in his answer; that the defendant first pleaded *nil debet*, which

Leave given to withdraw non est factum to a bond, and to plead the statute of gaming.

Post. Taylor v. Joddrell.

he would not stand by, and then pleaded *non est factum*, and an injunction with liberty to proceed to judgment was granted in Chancery.

Per curiam, (absente Cap. Justic') The court will not give leave to withdraw the general issue and plead specially where it is to the prejudice of the plaintiff, or where there has been an affected delay; in this case it appears by the answer in Chancery that the defendant has a good defence at law, and here is no affected delay; in the case of *Malters and Shelmandine*, Mich. 15 Geo. 2. leave was given to withdraw the general issue Not guilty, and plead a justification, upon the like terms as in the present case; and they said they remembered several other cases where the like had been done by the court; so the rule was made absolute.

Herring *versus* Durant. B. R.

Venue cannot be changed but into a county where the whole cause of action arose.

MR. Ford moved to change the venue from London into Kent, upon an affidavit that the cause of action arose upon a bridge called *Kingsbridge*, partly in the county of Kent and partly in the county of the city of Canterbury, and not elsewhere: But *per curiam*, We cannot change the venue into another county, unless the cause of action wholly arose there; and he took nothing by his motion.

Sibthorpe *versus* Moxholme. In Chancery, Nov. 10.

BILL brought by the representative of *Richard Chillingworth* to have a bond for 500*l.* delivered up to her.

Testatrix by will forgives her son-in-law a debt upon bond, and orders it to be delivered up, her son-in-law dies in her life-time, his representative shall have the bond delivered up.

The question in this case arises upon the will of the plaintiff's mother, by which she forgave her son-in-law *Richard Chillingworth* a debt due to her on bond for 500*l.* and all interest that should be due thereon at the time of her decease, and desired her executrix to deliver up the same to be cancelled. The will was made in 1743. *Richard Chillingworth* died after the making thereof, and soon afterwards in 1744. the testatrix died, which is admitted by the answer; the question is, whether the debt was extinguished, or this is a lapsed legacy, *R. C.* dying in the life-time of the testatrix.

Lord Chancellor: I am of opinion that the plaintiff by some means or other ought to have the benefit of this devise, and the bond delivered up; this is the case of a mother making provision for several branches of her family, and if this part of her will cannot take effect, part of her family would be unprovided for, the daughter herself being the plaintiff in this cause. Although it must be

be admitted the bond would have been assets in the hands of the executor in respect to creditors, yet it does not follow that it should stand as to the executor, who is a volunteer. If the executor had brought an action at law, this court would have granted an injunction; and though this wants the form of a *release*, and cannot be pleaded as *such* at law, the *will* being no *deed*, yet as against the executor and volunteers, will be considered in this court to have the same effect; and in the last part of this devise there is nothing *personal*, the will only ordering the bond to be delivered up, not saying to *whom*; and it differs from the case in 1 *Wms.* 83. and 2 *Vern.* 521. Decreed the bond to be delivered up and cancelled.

Pinfent versus Pinfent & al'. In Chancery.

LORD Chancellor: This is a bill preferred by a son, who claims as remainder-man in tail, against his father who is tenant for life without impeachment of waste, and part of the relief prayed is, that the title-deeds may be brought into court and deposited with the master for safe custody; this is a pretty extraordinary kind of relief that is prayed, I will not say it may not be proper in some cases, as where the father being tenant for life endeavours to better his estate, or to destroy the remainders; it may also be proper where the tenant for life was an entire stranger to the estate before the settlement thereof made, or in the case of a jointress; but I believe in those cases the masters will agree with me, that it would be much better and safer, if a third hand, who is a friend to the parties, could be found to deposit the deeds in; because when a master dies and another person comes in his place, deeds have been frequently lost; and this is the reason why I have always been cautious how I have decreed writings to be brought into court to be deposited for safe custody.

This bill is also against trustees to oblige them to make such settlement as is directed by the plaintiff's grandfather's will; and it appearing in the cause that the plaintiff has covenanted with several persons to grant them annuities out of such lands as shall descend or come to him in case he shall survive his father, it was objected by the defendant's counsel that these annuitants ought to be before the court; and I think this is a material objection, for these covenants to grant annuities are equitable liens upon the lands, whereof the trustees now have notice; and if I should order the deeds to be brought into court, the same might afterwards, upon the motion of the father and son (when they may be better friends) be delivered to them out of court, and then they might join in selling the estate to a purchaser for a valuable consideration without notice of these annuitants, and the annuitants could have no remedy but by bringing

Bill by a son who is a remainder-man in tail against his father who is tenant for life, to have the title-deeds deposited in court for safe custody. And also against trustees to oblige them to make such settlement as is directed by the plaintiff's grandfather's will. It appearing in the cause that the plaintiff has covenanted to grant annuities out of such lands as shall come to him after his father's death those annuitants must be made parties.

ing a bill against the trustees and the son; so that by making such order or decree as is prayed, without hearing the annuitants, might possibly be doing them injustice, and therefore the cause must stand over, with leave to amend by adding all proper parties, and the defendants must be paid the costs of the day.

Hilary Term

21 Geo. 2. 1747.

Feathers *versus* Bryan. In Error. B. R.

Shall be

Plaint levied in an inferior court before the cause of action accrued, is helped after a verdict.

THIS was an action upon the case upon a *quantum meruit* in the *Palace court*, wherein the plaintiff below declares, that in consideration he had permitted the defendant to enjoy such a messuage, being within the jurisdiction of the court for a long space of time, to wit, for the space of three quarters of a year, ending the 25th day of *March* last, he the defendant upon the 20th day of the same month of *March* at *Southwark* within the jurisdiction of the said court promised to the plaintiff to pay him so much money as he reasonably deserved to have for the same, &c. There was a verdict for *Bryan* the plaintiff below, and a writ of error being brought, it appears upon the transcript of the record that the plaint was levied at a court held upon the 10th of *March* last, which is before the three quarters of a year ended, for which time of enjoyment of the house the action is brought, and this is assigned for error.

Mr. *Ford* for the plaintiff in error: To shew that this was error, cited 1 *Ro. Abr.* 792 pl. 12. *Cro. Jac.* 69, 70. *Yelv.* 70. And said, this is not like the case where the day in the declaration appears to be before the cause of action, for though the day of the promise be laid to be made before the cause of action arose, yet it is not traversable.

Mr. *Bennè* for the defendant in error: This is after a verdict, and helped by the *stat.* 18 *Eliz. c.* 14. *f.* 1. which has been determined

mined to extend to inferior courts, *Salk.* 266. and in the case of *Thayer or Sayer & Ux' v. Curtis*, *Hil.* 10 Geo. 2. *Rotulo* argued *Pasch.* 10 Geo. 2. being an action of *assault and battery* in the *palace court*; and upon error brought it appeared that the plaint was levied six or seven days before the day of the assault laid in the declaration; and *per totam curiam*, This being after a verdict is aided by the *stat.* 18 *Eliz.* and the court intended there was no plaint at all; and in *Pasch.* 9 Geo. 1. *C. B. rotulo* 57. *Waterton v. Plaxton*, which was an action of *assault and battery*, and upon error brought it appeared that the day in the declaration was after the *teste* of the original writ; this case was argued by Mr. *Fazakerley* and Mr. *Reeve*, and being after a verdict *per curiam*, was helped by the *stat.* 18 *Eliz.*

Mr. *Ford* in reply: The *stat.* 18 *Eliz.* only helps an *original*, which is bad for want of form, and the *total want* of an *original*, but does not help a *bad original in substance*, as *this* is.

Per curiam: There is no difference between this case and *that* of *Sayer* and *Curtis*, which we well remember; and the case in *Yelv.* is not like *this*, for *this* is a *quantum meruit*, that the plaintiff having permitted the defendant below to enjoy the messuage for a long time, *viz.* for the space of three quarters of a year, ended the 25th of *March*, &c. The plaintiff below was not obliged to prove the whole three quarters of a year's rent due, and for aught appears to us the jury may have found less, but if they have not, this is helped, after a verdict. Judgment affirmed *per totam curiam*.

Dyke versus Sweeting. In Error. B. R.

THIS is an action of *covenant* in *C. B.* in which there is a *plea*, *replication*, *demurrer*, and *joinder in demurrer*, and the whole proceeding is entred upon record of *Trinity term*, in the 18th and 19th years of his present Majesty, with a continuance by *Cur' advisare vult* until *Michaelmas term* following, when an interlocutory judgment is given for the plaintiff below and a writ of inquiry of damages awarded, returnable in *Hilary term* following, and thereupon final judgment is entered of the same *Hilary term*. And upon error brought, the want of an *original* is assigned for error; a *certiorari* is awarded to certify whether there be any original writ of the same term with the *placita*, *viz.* of *Trinity term*, 18 & 19 Geo. 2. and returned that there is no *original* writ in this cause; upon *diminution* alledged a second *certiorari* is awarded to search the records of *Hilary term* 19 Geo. 2. wherein final judgment is given, and an *original* writ is thereupon returned between the parties, *tested* the 23^d day of *January*, returnable on the *octave* of the *Purification* of the blessed *Mary* in that term.

An original writ of the term wherein final judgment is given, will not warrant that judgment if it appear upon the same record that there have been proceedings of a preceding term.

PART I.

A a a

Serjeant

Serjeant *Poole* for the plaintiff in error : There is no *original writ* in this cause to warrant the proceedings of the court in the term whereof they appear to be recorded, and therefore this judgment is erroneous ; and I rely upon 1 *Lev. 69. Anonym.* which is exactly like the present case.

Mr. *Ford* for the defendant in error : Although the final judgment and *original writ* be both of the same term, yet the court will infer that the original was prior, and in the case of a *warrant of attorney* filed of a subsequent term to the *placita* ; the judgment is good though the *placita* be prior to the filing the *warrant of attorney*, as was held *inter Manning and Rook, Hil. 4 Geo. 2.* So also *inter Husk and Mingay.* And in *Trin. 11 & 12 Geo. 2. inter Phillips and Phillips,* the final judgment and *original writ* were both of the same term, and the judgment was signed before the *original* was returnable, and held to be good, although in strictness of law the court of Common Pleas is not possessed of the cause before the *original writ* be returnable, and if it be the ground and foundation of the action, it ought to be filed before any step or process at all can be made ; yet it is well known this is but matter of form, and if an *original writ* be taken out at any time pending the suit it is sufficient, so that the King be paid his fine for it.

Lee Ch. Justice : The question is, whether this *original writ* which appears to be returnable in *Hilary term* warrants the final judgment of the same *Hilary term*, when at the same time it appears to the court there were proceedings in the same cause in *Trinity* and *Michaelmas terms* before ?

Now it is certain that where the want of an *original writ* is assigned for error, and it appears that all the proceedings are of the same term wherein the *original* is returnable, such an *original* warrants those proceedings, let it be of any return in the same term ; but an *original* of the term wherein final judgment is given will not warrant it, if by the record it appears that there have been proceedings in the cause in the term or terms before, according to 1 *Lev. 69.* And the case of *Dismo and Shirley, Yelv. 108.* goes upon the same distinction, that when all the proceedings are in one and the same term, an *original* of that term will warrant the same, but not otherwise ; and 1 *Keb. 327. Booth against Beard* is directly in point ; to be sure the *original writ* is the very foundation of the suit in the Common Pleas in strictness of law, though the practice has gone so far as to allow an *original* to be good of the same term with the final judgment, if all the proceedings be of that term.

The case of *original writs* differs from *warrants of attorney*, for it is sufficient if a *warrant of attorney* be filed at any time pending the suit, let it be in which term it will; the *stat. Hen. 8.* only requires a *warrant of attorney* to be filed in the cause; and the *stat. 4 Anne* requires it to be filed according the course of the court, and that is to have it filed at any time pending the cause, and it is no matter when, so that it be in the *same suit*; but as to an *original writ* it is otherwise, for if there be proceedings in the action in a *term preceding the return thereof*, the *original* will not support them. Wright J. of same opinion.

Warrants of attorney may be filed at any time pending the suit, and well enough.

Dennison Justice: The *stat. 4 & 5 Anne* extends to judgments by default, provided there be *warrants of attorney* and an *original writ*, according to the rules of law. In the *Common Pleas* formerly when the proceedings were of two terms they used two rolls, which they called the *imparlance roll* and the *plea roll*, but of later times they generally make up the whole record of *that term* wherein *issue* is joined, or *interlocutory judgment* is signed, without any *alias prout patet*, so that now there is seldom any *imparlance roll*; I am of the same opinion that there must be an *original* of the *same term* with the *placita*; the court were going to reverse the judgment, but upon the prayer of Mr. Ford for the defendant in error, the court gave him time to apply to get an *original writ* of *Trinity term* in which the *placita* was.

Rex versus Parish of Bugden. B. R.

JOHN Green and his wife came with a *certificate* from the parish of *Royston* to the parish of *Amptbill*, where they had a son *Thomas* born, who continued to live with his father till he was 21 years old, and then married *Mary* his wife at *Amptbill*, and became head of his own family, and lived separate from his father. *John Green* the father went from *Amptbill* to live in the parish of *Bugden*, where he hired a house at 10*l. per ann.* and thereby gained a settlement at *Bugden*; *Thomas Green* the son, his wife and children, becoming chargeable at *Amptbill*, were, by order of two justices, which was confirmed by the sessions, removed to *Bugden* as the last place of the old man's legal settlement, he not having by any act of his own gained any settlement: But by the whole court, both orders were quashed, for where the son becomes independent of his father, as in this case, he shall not follow the father's last place of settlement, but shall be sent to *Royston*, where his father's settlement was at the time he separated from his father's house, and the son was never at *Bugden* with his father; the case of *St. Michael's Norwich* and *St. Nicholas Ipswich*, about twenty years ago, is the very same with this case, where there was the same determination, and

When the son of a certificate man becomes independent of his father, he shall not follow his father's last settlement that he gained by purchase, but shall be sent to the place from whence he came with his father by certificate.

and when the father gained a settlement at *Bugden* he gained it for himself and family, but *Thomas* the son was then no part of his family, so could have no settlement at *Bugden*.

Rex *versus* Inhabitants of *Silton*. B. R.

A son of a certificate man is bound out an apprentice, he thereby gains a settlement.

GILES *Milburn* and *Priscilla* his wife were certificated by the parish of *Silton* to *Wincanton*, and there they had a son born *John*, whom the parish of *Silton* bound out apprentice to a taylor in the parish of *Horfington* for eight years, which he served, and afterwards married and went to live at *Wincanton*, where he and his family became chargeable, and by an order of two justices confirmed by the sessions was removed to *Silton*, the place of his father's certificate, the sessions being of opinion that he had not gained a settlement at *Horfington*, because the statute says a certificate person can only gain a settlement by purchase or serving an annual office: But the court quashed both the orders, because when the parish of *Silton* had bound the son apprentice in *Horfington* they had provided for him, and his service gained him a settlement *there*, and he was no longer any part of his father's family after he was bound, and *Horfington* was the last place of his legal settlement, and *Wincanton* should have sent him *thither*.

The Master, Fellows and Scholars of *Suffex* and *Sidney* College *versus* *Davenport*. B. R.

Bond to Doctor Craven, master, fellows, &c. of *Suffex* and *Sidney* College, solvendum to the master, &c. is a bond taken in their corporate capacity.

DEBT upon a bond to *Doctor Craven* (the Master,) Fellows and Scholars, &c. *solvendum* to the Master Fellows and Scholars; defendant craves oyer of the bond, and pleads that before the filing of the bill *Doctor Craven* died; the plaintiff demurs, and defendant joins in demurrer.

Serjeant *Poole*: The plea is bad, because this is a bond to the college in their corporate capacity, and a corporation never dies.

Mr. *Ford* *è contra*: I admit the plea is bad if the bond be taken in their corporate capacity, but it is to *Doctor Craven* Fellows and Scholars, &c. if it had been to the Master, Fellows and Scholars, &c. it would have been right.

Per curiam: There is no question but the bond being to *Doctor Craven*, &c. *solvendum* to the Master Fellows and Scholars, is a bond to them in their corporate capacity, and the duty is to the Master, Fellows and Scholars. Judgment for the plaintiff.

Simmonds *versus* Parminter and Barrow. Hil.
17 Geo. 2. Rot. 921. B. R.

THIS is an action upon the case upon several promises made by the defendants jointly, who have pleaded several pleas, and upon this record two issues are joined, one upon a demurrer in law, the other upon *nul tiel record*; the demurrer has been argued, and judgment thereupon is entred for the plaintiff; also a writ of inquiry of damages has been executed, intire damages given for the plaintiff upon all the counts generally, but nothing appears to be done upon the issue of *nul tiel record*.

An action upon a bill of exchange lies for the drawer against the drawee after he has accepted it.

Sir *Thomas Bootle* for the defendants in arrest of judgment: This declaration contains several counts, and general damages being assessed upon the whole declaration, if any one count therein be bad, the judgment must be arrested. My objection is to the sixth count, which is laid in this manner, *viz.* That the plaintiff on the 28th of *June 1839*: at such a place, according to the custom and usage of merchants, made his certain bill of exchange in writing, and directed it to the defendants, then at *Bilboa in Spain*, and thereby requested them *at usance* to pay that his first bill of exchange in *Spain* to the order of *John Evangelist Cleere and company*, 4000 dollars in gold or silver, as to the exchange known to them that day value in account with the said gentlemen, as by advice, which bill the defendants accepted according to the usage and custom of merchants; and the plaintiff in fact saith, that the *usance* between *London* and *Madrid* time out of mind hath been at *two months*, and that the defendants did not pay to the said *John Evangelist Cleere and company*, or order, the contents of the said bill, but refused to pay the same, whereupon afterwards upon the 21st of *September 1739*. the said *John Evangelist Cleere* (having made no order concerning the payment thereof) protested the said bill at *Madrid*, according to the custom and usage of merchants upon such non-payment; by reason whereof the plaintiff, according to the usage and custom of merchants, became liable to pay to the said *John Evangelist Cleere* the contents of the bill, together with the interest, exchange and re-exchange and damages, which should accrue from the delay of payment thereof, and being so liable, he the said plaintiff afterwards on the 1st of *January 1739*. paid to the said *John Evangelist Cleere* the contents of the said bill, and also 36 l. 1 s. for the interest exchange and re-exchange, costs and damages which did accrue from the delay, whereof the defendant afterwards on the 15th of *January 1739*. had notice, by reason of the premisses, and by force of the usage and custom of merchants, the defendants became liable to pay the plaintiff the contents of the said bill, and the said

PART I.

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sum of 36*l.* 15*s.* and being so liable, promised payment when requested.

My objection is, that a *drawee* who accepts a bill of exchange, and afterwards refuses to pay it to the *payee*, is not liable to the *drawer*, although it must be admitted he is liable to the *drawee* or his *indorsee* upon the acceptance thereof, and there is no such custom and usage among merchants as is set out in this count, or if there be any such custom, it is unreasonable and void; but if there be any such custom it lies upon the plaintiff to shew it, for I cannot find any such in any book that I have read, and if ever there was such a custom it must have been taken notice of by some mercantile author or other. And I never knew an action by the *drawer* against the *drawee* of a bill, unless it came back to him again by being indorsed to him. See *Bac. Abr.* 614.

Actions upon bills of exchange are grounded upon the custom of merchants, for *debt* will not lie for the *drawee* against the *acceptor* of a bill, because it depends upon a particular custom, and is not founded in contract. *Hard.* 485. Neither will an *indebitatus assumpsit* lie thereupon. 1 *Mod.* 285, 286. *Salk.* 125. S. P.

Serjeant *Poole* of the same side for the defendant: 1. There is no such custom; if there is, they must shew it out of some book of authority, or the court will not intend there is any such; before the *statute of 2 Ann.* for making notes of hand negotiable like bills of exchange, an action was brought upon a note indorsed, and in the declaration it was laid that the defendant, according to the custom of merchants, was liable; and in arrest of judgment it was moved that there was no such custom, and if so, there was no consideration for the promise. *Holt Ch. J.* held the declaration ill, and said the court could not intend any such custom. And in the present case the demurrer does not confess any such custom as is laid, for there is no special custom set forth.

2. The custom contended for would be unreasonable if there was any such, and therefore void; for, from the very nature of the transaction the *drawer* is the *debtor*, and by his draught acknowledges so much money is owing by him to the *payee*, and the defendants, the *drawees*, only come in, in aid of him; and it may be compared to this case, *viz.* *A.* owes *B.* 20*l.* *B.* requires it of *A.* who tells him if you will go to *C.* he will undertake to pay it for me; *B.* goes to *C.* accordingly, who undertakes to pay it in two months; at the end of that time *B.* demands it of *C.* according to *C.*'s promise, when *C.* tells him that *A.* is now able to pay him, and so he goes to *A.* who pays him his own debt. Is there any reason in the world that *A.* shall come upon *C.* to be repaid the

201. which was originally *A.*'s own debt due from him to *B.* and *C.* was only to come in in aid of *A.* there is no difference between this and the case at bar; and if the drawee accepts a bill and pays it, it is *prima facie* evidence of a debt due to him from the drawer. *Vid Lucas's Rep. in Lord Macclesfield's Time.*

Stracey, recorder of *London*, of the same side with the defendant: It is not set forth in the declaration how much 4000 dollars amount to in *English* money. There is another objection, and that is, that it appears upon this record that there is an *issue* of *nul tiel record* joined, and nothing further has been done upon *that issue*, but only judgment has been given upon the *issue joined upon the demurrer*, and therefore there is a *discontinuance*, which is not aided by the *stat. 4. & 5 Annæ, 2 Ld. Ray. 1482.*

Another objection there is, which has not yet been mentioned, and *that is*, that the bill of exchange is made payable to the order of *John Evangelist Cleere*, and it appears by the declaration that he never made any order upon the said bill, so there was no reason for protesting it.

Mr. Banks for the plaintiff: A bill returned protested for non-payment being once satisfied by the drawer to the deliverer, the drawer is discharged, and so is the acceptor as to him to whom the monies were paid; but the acceptor by virtue of his acceptance makes himself debtor, according to the custom of merchants, to the drawer. *Molloy de Jure Maritimo, lib. 2. sec. 35. fo. 306. Edit. 6.*

Serjeant *Draper* for the plaintiff: When a merchant draws a bill, he thereby acknowledges himself to be indebted to him to whom it is payable; so the drawee by accepting such bill owns himself indebted to the drawer. If I draw a bill upon a man payable to *myself*, or order, and he accepts it, he thereby acknowledgeth that he owes me so much money as the bill is for, *Salk. 130.* and so was the case of *Rawlinson v. Stone* lately, 1 *Ld. Ray. 88.*

This is a contract between the drawer and acceptor, the meaning whereof is this, "I desire you to pay so much money to my order, and *that* shall be your discharge;" which, by under-writing the bill the drawee agrees to, and the money must be first demanded of the acceptor before the drawer be liable to the payee. 1 *Salk. 127, 131.* The acceptor is liable to whatever indorsee the bill comes, 1 *Lutw. 185, Death v. Serwonters.* If the drawee refuses to accept a bill, it is *nudum pactum* between him and the drawer; but if he does accept it, it becomes a *debt ex quasi contractu.* The acceptance of a bill of exchange is a trust, and if a man excepts a trust,

trust, he is bound to perform. 1 Salk. 26. *Coggs v. Bernard*. Et vide *Justin. Inst. lib. 3. tit. De obligationibus quæ quasi ex contractu nascuntur*, & *tit. De gestu negotiorum*. Ibid.

Mr. Norton for the plaintiff: After several arguments and judgment upon the demurrer, the defendant is too late, and cannot now move in arrest of judgment. *How v. Godfrey*, Mich 4 Geo. 2. There was a demurrer to a declaration, and judgment for the plaintiff, and it was ruled the defendant could not move in arrest of judgment. The case in *Ld Raym.* does not warrant the objection that here is a discontinuance, but if there is, it is aided by the *stat. H. 8. & 4 & 5 Annæ*. It is objected that the declaration does not set forth how much 1000 dollars amount to in *English* money; in answer to this the jury have ascertained the value by finding the damages in *English* money.

2 Nov A 301

The principal matter in this case, and upon which the whole must turn, is, whether here is not a good consideration for the promise laid in this count; and I agree, if there is not, the plaintiff cannot have judgment; it is certain the defendant has accepted the bill, and as certain that he has not paid it, whereby, and by the custom, &c. the plaintiff has been obliged to pay the bill with interest, exchange and charges of protesting. The defendant has not protested the bill as accepted by him for the honour of the drawer, and therefore according to the usual practice of merchants it must be intended he accepted it, because he had effects of the drawer in his hands. Vid. *Molloy* 299. the nature of an acceptance for the honour of the drawer. 2 Keb. 695. *Smith v. Abbot*, Pasch. 14 Geo. 2. where the defendant accepted a bill of exchange to pay it when the goods consigned to him were sold, and held that it was a good acceptance, and bound him when the goods were sold; and Lee Ch. Justice, when he gave judgment in *Smith v. Abbot*, cited Salk. 129. *Molloy* 304. And if an acceptor do except a bill generally when he has no effects of the drawer in his hands it is his own folly, because he might have accepted it conditionally.

2 Stra. 1152.

A bill once accepted cannot be revoked by the party who accepted it, *Molloy* 303. 6th Edit. the reason is, because by the acceptance he confessed himself indebted to the drawer. Vid. *Bac. Abr.* 6. 2.

It is objected that the acceptor having paid a bill may bring an action against the drawer for so much money paid to his use; this may be true if the ballance of account is not on the drawer's side, but the court will not intend that it was proved to the jury that the defendant had effects of the plaintiff in his hands.

It

It is objected that the *payee* never made any *order* upon the bill which is only payable to his *order*; in answer to this, if the *drawer* has an interest in the *acceptance*, he cannot be defeated of it either by the *acceptor* or *payee*; and if the *payee* had indorsed it he would have been liable to whomsoever the bill should come. This is a judgment by default, and therefore the jury must find some damages, the defendant having, in effect, confessed the action, though the merits of this count should be against us; and the court in their discretion may award a new writ of inquiry, as it is only an inquest of office, and to inform the conscience of the court, and then damages may be taken upon such other counts in the declaration as are certainly good.

Sir Thomas Bootle for the defendant in reply: Formerly it was not usual to move in arrest of judgment, but the way was to put in a plea in arrest of judgment; but of later times, if it appear upon the record that any count is bad, it may be taken advantage of by motion or writ of error. When judgment passes by default the defendant is out of court, and whoever then comes to move in his behalf, comes as *amicus curiæ* to inform the court of any error which may be in their judgment. My objection is singly *this*, which has not been answered, that the law never allowed this to be a *custom*; but is it said the *payee* having paid the money, raises a *consideration* between the *drawer* and the *acceptor*, whereas the count is laid merely on the *custom* of merchants; the old way was to set out the *custom* particularly and at large, but lately it has been laid generally, because the law takes notice of the *custom* of merchants as part of the law of the land; the tenor of the bill is to pay it to the *payee*, and not to the *drawer*.

Lee Ch. Justice: This count is laid upon the *express promise* of the defendant.

Bootle: The *promise* is not necessary to be laid in an action on a bill of exchange, because the action is not founded in *contract* but upon the *custom*. *Carth.* it is laid that by reason of the *premisses* and the *custom* the defendant became liable and promised.

Lee Ch. Justice: The *count* says that the defendant accepted the bill, and became liable by the *custom*, and being so liable *neglected payment*, and thereby the plaintiff was obliged to pay it, and did pay it; by reason of which *premisses* and the *custom* the defendant became liable, and so promised to pay the plaintiff; this seems to me, as at present advised, to be a good *consideration* to raise the *promise*.

Bootle : If this matter be taken in the manner your Lordship seems to say it must, it must be upon *contract*, but all actions upon bills are founded on *custom*. Indeed if the defendant had said to the *drawer*, I have not money by me at present, do you pay it to the *payee*, and I will pay you again; this would have been an express *contract*, and a strong *consideration*, being at the defendant's request; but what I rely upon is, that the *count* and *promise* laid therein are founded upon *custom* and not *contract*, and there being no such *custom* among merchants, it is bad.

Serjeant *Poole* in reply : Where there is a demurrer to a declaration upon one count and judgment is given therein, you cannot (I admit) in that case move in arrest of judgment, because the matter has been considered before; but where there is a demurrer to the declaration upon several counts, if any one of the counts is good the plaintiff shall have interlocutory judgment; yet nevertheless if upon executing a writ of inquiry he takes damages generally upon all the counts, and one is bad, the defendant may move in arrest of judgment.

The gist of this action is the *custom* of merchants, and there is nothing disclosed in the declaration that the *acceptor* requested the *drawer* to pay the *payee*; by reason of the premisses, &c. The word *premisses* relates only to the matter of fact, and the *custom* is *what* is relied upon in the *count*. What is said in *Molloy* 300. is a mere *dictum* of the author, for there never was case like this.

Upon executing the writ of inquiry the only *evidence* laid before your Lordship was the *bill* and the *acceptance*, and that the plaintiff had paid the *payee* the money and charges, there was no evidence that the defendant had any effects of the plaintiff in his hands.

The whole court seemed to be of opinion for the plaintiff; and after time taken to consider over-ruled all the exceptions taken by the defendant; they said the *acceptor* had made himself liable to the *drawer* as well as to the *payee*, and to every *indorsee* to whom the *payee* should transfer the bill, and that a bill payable to the order of *A.* is the same as if it were to *A.* or order; and as to the *discontinuance*, that was helped by *stat. 4 & 5 Ann.* and judgment was afterwards given for the plaintiff, and upon a writ of error was affirmed in the house of lords.

Pond *versus* King. B. R.

ACTION upon a policy of insurance against the underwriter, upon the *Salamander* privateer (of which the plaintiff was a part-owner) from the Downs to any port or place where she should sail for three months from the 2^{1st} of December 1744. the *præmium* was four guineas per cent. per month, interest or no interest, free from average, and without benefit of salvage; the insurance is against such perils as are usually mentioned in policies, but with a clause at the end, that in case the ship is not heard of in twelve months, then the money insured shall be paid by the insurer; the breach assigned is, that this ship the *Salamander* was taken by a French ship of war within the three months, and was wholly lost, whereby she could not prosecute her voyage or cruise. The defendant pleaded *non assumpsit*, and upon the trial at Guildhall the jury gave a special verdict; which first finds the policy in *hæc verba*, and then that the ship set out upon her cruise the 21st of December 1744. the time of making the insurance, and cruised until the time she was taken; that she was an English privateer duly commissioned, the number of men she had, and what guns she had at the time of the capture, and that within the three months, to wit, the 2^d of February 1744. she met a French ship in the Bay of Biscay, that in an engagement with her the *Salamander* was taken, that 117 of her men were taken out of her and carried into France, and her guns taken out, and that the *Salamander* thus taken remained in the possession of the enemy from 4 o'clock in the afternoon of the 2^d of February until 5 o'clock in the afternoon of the 5th of February; that before she was carried into any port she was retaken by an English privateer, the *Vultur* captain Hunter, and by him kept upon the high seas for eight days without sailing, and at the end of eight days the *Vulture* took a French prize, and together with her and the *Salamander* endeavoured to come into some English port, but the wind not permitting he carried them into Lisbon; that the *Salamander* remains there in the possession of the master of the *Vultur* for the benefit of those to whom she belongs; that the plaintiff is interested exceeding the sum insured; that the ship was prevented from finishing her three months cruise by the capture, but that she was a living ship at the end of three months; that Lisbon is a neutral port; that the master of the *Vultur* commenced a suit in the court of Admiralty at Gibraltar against the *Salamander*, and sentence there was given the 29th of April 1745. and a decree was made that she should be restored to the owners on payment of one third part for salvage, which sentence still remains unreversed, and the verdict concludes in the usual form. This

A ship insured for a voyage or cruise of three months is taken by the enemy within that time but before she is carried infra præsidia hostis, is retaken by an English man, and is now a living ship; this is a total loss to the insured.

special verdict was twice argued at the bar by Mr. *Erskine* and Mr. *Hume Campbell* for the plaintiff, and Mr. *Comyns* and Mr. *Henly* for the defendant, and after time taken to consider, the judgment of the whole court was delivered by

Lord Ch. Justice *Lee* : The question in this case is, Whether the capture of this ship, which was never carried *infra præsidia hostis*, before she was retaken, and upon the matter as found by the verdict, shall be considered as a *total loss*, so as to intitle the *insured* to recover the whole sum insured. And although by the *civil law* perhaps it may not be adjudged a *total loss*, yet the *rules of that law* are not to govern us, but we must give our judgment according to the *common law of England*, and upon *this agreement* between the parties, whose intention appears, and must guide us. By the *civil law* there must be a *total loss* to intitle the *assured* to recover, but the *policy* in this case extends to *captures* or other accidents. The case of *Depiba* and *Ludlow*, Trin. 5 Geo. 1. C. B. before Lord King, is almost a case in point, and in that case he said he was bound to determine according to the *common law* and the meaning of the parties. The meaning of the parties here is plain, the *insured* paid his *premium* in consideration of the *insurer's* undertaking that the *Salamander* should cruise safely during three months; the jury has found she has been disabled from prosecuting her cruise for the three months: We are all of opinion for the plaintiff upon the breach assigned, and that *this* is not an *average loss*, but a *total loss* to the *insurer*; and the opinion in *Depiba* and *Ludlow*, Comyns 360. warrants us in saying this; the *insurance* is to be understood for the *voyage for three months*, and in common sense it cannot be otherwise; so whenever the voyage is broken or interrupted it is at an end. *Safety* during the *three months* is *what* is meant, but it appears the ship was taken and detained within *that* time, and that the plaintiff was hindered in his cruise; and *this*, by our law, is a *total loss* to the plaintiff. I have avoided saying any thing whether this was a prize or not, as being never carried *infra præsidia hostis*, because we are all of opinion this is a *total loss*. Judgment for the plaintiff.

Quære, Whether since this case there has not been a determination that this was only an average loss.

Lampley & al' and Thomas & al'. B. R.

Pleas at Westminster before the King himself of the term of Saint Michael in the sixteenth year of the reign of King George the second of Great Britain, &c. Roll.

Glamorganshire. **B**E it remembred, that on *Saturday* next after three weeks from the day of *Saint Michael* in this same term, before our sovereign Lord the King at *Westminster* come *Lewis Lampley* and *Mary Thomas* by *Andrew Smith* their attorney, and bring in the court of our said Lord the King now here their certain bill against *William Thomas*, (and others) being in custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, of a plea of trespass; and there are pledges of the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, (to wit) *Glamorganshire*, to wit, *Lewis Lampley* and *Mary Thomas* complain of *William Thomas* (and others) being in the custody of the marshal of the *Marshalsea* before the King himself, of a plea of trespass, for that the said *W. T.* (and others) on the 22d day of *October* in the year of our Lord 1742. with force and arms took and carried away the cattle, to wit, two oxen, three cows and one calf, of the said *L. L.* and *M. T.* of the price of thirty pounds, and then found at *Reynoldson* in the county aforesaid, and converted and disposed thereof to their own use, and seized, took and carried away the goods and chattels, to wit, 20 cart loads of wheat in the straw, forty cart loads of barley in the straw, 50 cart loads of oats in the straw, and 400 bundles or trusses of reed of the said *L. L.* and *M. T.* to the value of forty pounds, then and there found, and converted and disposed thereof to their own use, and then and there did other wrongs to the said *L. L.* and *M. T.* against the peace of our Lord the now King, and to the damage of the said *L. L.* and *M. T.* of 50*l.* and therefore they bring their suit, &c.

Breve Domini
Regis non
currit in
Wallia.

And the said *W. T.* (and others) in their proper persons come and defend the force and injury, and say that the said county of *Glamorgan* is one of the twelve counties within the principality or dominion of *Wales*, within which county there are and time out of mind have been justices, and that all and singular pleas and actions, as well real as personal arising within the same county are, and at the time of exhibiting the said bill of the said *L. L.* and *M. T.* were, and for time immemorial have been, and of right ought to be pleaded and pleadable within the said county of *Glamorgan* before the justices there for the time being, and not here in the court of our said Lord the King before the King himself, and that they the said *W. T.* and (others) at the time of exhibiting the said bill of the said *L. L.*

Plea to the
jurisdiction of
the King's
Bench in
Wales.

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and *M. T.* and before were, and from thenceforth hitherto have been resident and commorant in the same county, that is to say, at *Reynoldson* aforesaid in the said county; and this they are ready to verify, as the court here, &c. wherefore since the cause of action aforesaid arose in the said county of *Glamorgan* within the principality or dominion of *Wales*, the aforesaid *W. T.* (and others) pray judgment if the court of our Lord the King here will or ought to have farther *conusance* of the plea aforesaid.

Demurrer.

And the said *L. L.* and *M. T.* say, that notwithstanding any thing above pleaded by the said *W. T.* (and others) the court here ought to have further *conusance* of the plea aforesaid, because they say that the said plea, and the matter therein contained, are not sufficient in law to oust the court here from having or taking further *conusance* of the aforesaid plea, and that the said *L. L.* and *M. T.* have no occasion, nor are they bound by the law of the realm to answer the said plea in manner and form as the same is above pleaded; and this they are ready to verify; wherefore they pray judgment, and that this court will have and take further *conusance* of the said plea, and that the said *W. T.* (and others) may answer over to the bill of the said *L. L.* and *M. T.*

Joinder in demurrer.

And the said *W. T.* (and others) say that the said plea, and the matter therein contained, are sufficient in law to oust this court here from having or taking further *conusance* of the aforesaid plea, which said plea, and the matter therein contained, they are ready to verify and prove, as to the court here shall seem meet: and because the said *L. L.* and *M. T.* have not answered the said plea, nor have hitherto in any manner denied the same, they the said *W. T.* (and others) as before pray judgment if the court of our said Lord the King now here will or ought to have further *conusance* of the plea aforesaid; but because the court of our said Lord the King is not yet advised, &c.

* Rider.

This case was argued three times, the first time by Mr. *Hume Campbell* for the plaintiffs, and serjeant *Bootle* for the defendants, in *Hilary term* 17 Geo. 2. the second time by Mr. *Evans* for the plaintiff, and * *The Attorney General* for the defendants, in *Mic. term* 18 Geo. 2. and the third time by Sir *John Strange* for the plaintiffs, and Mr. *Gundry* for the defendants in *Easter term* 19 Geo. 2. when it stood for the judgment of the court; but some of the parties dying the suit abated, so another action was brought by *Jones* against *Jones*, in which there were exactly the same pleadings as in the case of *Lampley v. Thomas*, which was argued by Mr. *Philips* for the plaintiff, and Mr. *Charles Pratt* for the defendant, so that this great question, whether the court of King's Bench have *jurisdiction* to send

send a *latitat* into *Wales*, has been four times most learnedly argued at the bar by gentlemen of the greatest learning and experience.

Mr. *Hume Campbell* for the plaintiff: The plea is bad in form ^{1st Argument.} and substance, for wherever a plea goes to the *jurisdiction* of this court, it must give *jurisdiction* to some other; but there is no such court in existence as is set forth in the plea, which is, that there have been justices time out of mind before whom all pleas arising in the county of *G.* have been pleaded time out of mind, and not in this court; the court in *Wales* must mean the *Great Sessions*, which it is well known is not a court by *prescription*. 27 H. 8. c. 6. sec. 10. And all the Judges of *England* were of opinion that the Judges of the *Grand Sessions* must be appointed by the King's letters patent, 4 Inst. 239, 240. Another mistake there is in the plea, which alleges that the defendants are resident in the county of *G.* which is in effect denying that they are in custody of the marshal, which this court never allows to be put in issue.

The great question is, whether by the statutes of 12 Ed. 1. of *Wallia*, and the 27 H. 8. c. 26. which unite *Wales* to this kingdom, and erect the court of *Grand Sessions*, have given that court a *jurisdiction exclusive of this court*.

There cannot be a doubt but this *high court held before the King himself*, has a general *jurisdiction* over the kingdom of *England*, and if an act of parliament should annex or unite any other country to *England*, the *King's Bench* here would have *jurisdiction* over it if there were not words in the statute to exclude it; and in the *statute of union of Scotland to England*, it is declared that no alteration shall be made in the laws of *Scotland* which concern private right; but in the *statutes* which unite *Wales* to *England*, there is not a word to exclude the *jurisdiction* of this court; and to shew the legislature thought this court had such *jurisdiction*, see the *statute* 4 & 5 W. & M. for empowering this court to appoint commissioners for taking special bails. 1 Ed. 6. c. 10. where the under-sheriffs of *Wales* are required to attend *this court*, and the 18 Eliz, for appointing justices of assize in *Wales*.

The courts of *Chancery* and *Exchequer* exercise *jurisdiction* in *Plowden* 199. *Wales*, as having *original jurisdiction*; and for what reason *this* ^{b^c Stradling} court, wherein the *king himself* is supposed to be personally present, ^{v. Morgan.} should be excluded, I cannot conceive, since there is no law that I know of which excludes it.

Eottle Serjeant for the defendant: The plea is good both in form and substance; it alleges there have been justices in *Glamorganshire* who have time out of mind taken, and now do take *consuance* of all pless

pleas arising within *that* county; this is a matter of fact, and an issue might have been taken upon it, but by the demurrer it is confessed to be true; and the reason for alledging that the defendants are *resident* in *Wales* is, because if they were not, perhaps they might be subject to the *jurisdiction* of this court; it is said, how can they be *resident* in *Wales*, when by the record it appears they are in custody of the marshal? but this is a fiction, and they cannot be supposed to be in his custody, but upon this further supposition that a *latitat* can run into *Wales* to take them, and that is the great question now before the court. And in 1 *Salk.* 1, 2. although a man may be in *custod' Mar'*, &c. one may claim *conusans*. 5 *Mod.* 310. S. P.

T. Raym.

206.

3 *Keb.* 401.

2 *Mod.* 10.

2 *Bulf.* 156.

Het. 18.

Cro. Jac. 484.

Plowd. 127. b.

As to the substance of the plea, I shall not contend but that the *King's commission*, and certain of his mandatory writs, and all judicial process may issue into *Wales*, but a *latitat* or other *mesne process* cannot go out of this court into that dominion or principality.

Before the *stat.* 12 *Ed.* 1. of *Rutland*, called the *statut. Wallie*, *Wales* was a dominion of itself, governed by its own laws, and not subject to the laws of *England* with respect to the laws touching private right or property between one *Welch* subject and another; indeed, when any dispute arose between the *Prince* and the *Lords Marchers*, or the *Bishops*, in such case they applied to the *King's* great courts *here*, which determined the matter between them, because the *Prince of Wales* held his dominion (as a *feudatory*) of the *Kings of England*; there is a remarkable case in *Fitzherbert's Abr. tit. Affize*, 18 *Ed.* 2. cited in *Vaughan* 403. and which is not in the printed year books, though he says there are some MSS. copies extant of *Ed.* 2. (one of which I * have) which, by the hand writing appears to be of *that age*, the case at full length is thus (as I have translated it *verbatim*.)

* The reporter.

John Le Moigne sued to reverse a record of an *assize of novel disseisin*, which passed between *Alice of C.* and himself, and the case was, that *Alice* brought an *assize* against *John* and against other persons, and the writ of *novel disseisin* was brought to the sheriff of *Gloucestershire*, of her freehold in *Gowers*, and made her plaint of two *commots* which intirely comprehend all the land of *Gowers*, and the *assize* passed before *Sir John Beurs* and his companions, justices assigned to take the assizes in the *Marches of Wales*, &c. *Basset* assigned the errors in this form: The writ of *assize* was directed to the sheriff of *Gloucestershire*, who is one of the sheriffs of *England*, and the tenements put in view were in *Wales* which is *another land*, so that the writ shall not go, either of right, or by law, to the sheriff of *one land*, of tenements in *another land*; and forasmuch as the justices have taken the *assize* by *such writ* which was directed

directed contrary to law, *they have erred*; and also the land of *Gowers*, is out of the power of the sheriff of *Gloucestershire*, and the sheriff could not at all serve the writ upon the tenements out of his power; and forasmuch as the justices, &c. (as above) *they have erred*. And also, by the statute, *assizes shall be taken in the county where the land lies*; but *Gowers* is in no county, and for that they have taken the assize in no county at all, inasmuch *they have erred*, &c. And also the writ was brought of her freehold in *Gowers*, whereas every writ shall be brought *de libero tenemento suo in a vill or hamlet*, but *Gowers* is neither vill nor hamlet but it is one whole country or territory; and therefore she ought to have brought her writ *de libero tenemento in the vills*, and have named all the vills of the country in which it lies, and for this the writ is bad; and forasmuch as they have taken the assize, &c. (as above). * *Scrop*: As to the first point, where you say that the writ shall not be directed to the sheriff of one land, of tenements in another, and that this was such a writ, &c. and that the tenements whereof the assize passed were out of the power of the sheriff of *Gloucestershire* &c. and that the tenements put in view, and of which the assize passed, were not in the county; as to this I answer unto you, that *Gowers* is one Barony of the *Marches of Wales*, and we tell you that every Baron of the *Marches* hath his chancery and his own writs within his own barony, so that when one of his tenants hath done wrong to another, he shall do to him right; but when the baron himself is ousted intirely of his Barony, he cannot have remedy by his own writ for he is ousted of all, and therefore it was ordained in the parliament that when a Baron of the *Marches* is himself ousted wrongfully of his Barony he ought to resort to his Sovereign Lord, that is to the King, to purchase remedy, and shall have a writ in the chancery of the King, and that writ shall go the sheriff of the next county in this land, and he shall serve the writ, because that the Barons of the *Marches* are not within counties, therefore as to this, that the sheriff of *Gloucestershire* served the writ, it was because he was the next sheriff to the land, wherefore as to this process, there has been no error. And as to that which you say, that the writ was not brought in the vill or hamlet, this challenge laid when the parties pleaded in court to this writ, but the parties have taken the writ as good, and the justices have not erred, for as you have not challenged the writ, it shall, in this case, be now taken to be good; and because there is no error at all in the record, where you have assigned, we affirm the judgment, and you Alice may sue execution of the land, and Marshal! do you take custody of John for the damages, &c.

* Chief Justice
of the King's
Bench.

Writs of *quare impedit* have often been brought of churches in *Wales* ^{12 Ed. 3 c. 7.} in the King's courts here, but that was either because the dispute was ^{24 & 35 H. 8.} between the lords marchers, or between the bishop and others, and ^{27 H. 8.} because the Princes of *Wales* could not writ to the bishops in *Wales*. ^{1 W. & M.} ^{5 Eliz. c. 23.}

Vaugh. 409.

PART I.

E e e

There

There are several *statutes* that give particular powers to this court which it exercises into *Wales*, but *none* that give it power to send *mesne process* there, between subject and subject; and there is no instance where it was ever determined that this court sent a *latitat* into *Wales*, nor has ever any *latitat* gone there till within three or four years last.

Lee Chief Justice: I hope those gentlemen who are to argue this case the next time against the *jurisdiction* of this court into *Wales*, will let us know upon what foundation it is, that any other court in *Westminster-hall* can exercise a *jurisdiction* by sending *mesne process* into *Wales*, and why this court cannot, which will guide me very much in the judgment I am to give.

Serjeant *Boote*: The court of *Exchequer* says, that the debtor of the King is considered as in the King's place, and so privileged to sue in which court the King pleases, which has usually been in the *Exchequer*. Here ends the substance of the first argument.

2d Argument. The 2d argument. Mr. *Evans* for the plaintiff: What the original state of *Wales* was before the *stat. 12 Ed. 1. of Snaudon or Ruthein* is very much doubted; some say it belonged to *England* before that time, others say it was quite independent upon it; I am to contend that it was originally part of *England*, and belonged to it, which is a little hard for me to do, who am a *Welchman*; the evidences to prove *this*, are the declarations of the *Kings and Parliament of England. 12 Ed. 1. 27 Hen. 8. and Dodderidge in his treatise of Wales* says, "it was separated or divided from *England* by some of the *Saxon Kings*;" if this be true, it follows that all the King of *England's* high courts had *jurisdiction* in *Wales* originally.

The Princes of *Wales* were amenable to the Parliament of *England*; the Parliament could have no power to summon any one to Parliament who was not a subject of *England*; from hence it is plain *Wales* was a part of *England*.

Wales may be considered in the nature of the counties *palatine*, and it never was disputed but *they* are part of *England*; and if a judgment be given in any court at *Westminster*, the subject has a right to have execution out of *that* court into the counties *palatine*; and the reason given why these courts have *jurisdiction* for *mesne process* into the counties *palatine*, is because the King's courts here had such a *jurisdiction* antecedent to their being counties *palatine*, and there is now no doubt but *this* court can issue an execution into *Wales*.

That

That *Wales* was part or holden of *England*, the case of *David*, brother to Prince *Fluellin*, plainly shews, for if it was not, *David* could not by the law of nations have been hanged for a traitor; and *Ed. 1.* is said to have suppressed the rebellion there, not to have conquered *Wales*. 4 *Inst.* 239.

Supposing I have proved that this court had original jurisdiction, the acts of Parliament relating to *Wales*, and for erecting courts there, having no negative words in them as to the King's great courts, have not excluded them; the whole intent of those statutes seems to be only to bring all the people of *England* and *Wales* under one law, and that those who were poor might obtain justice near home, was the reason for erecting the court of *Grand Sessions*.

In the statute 34 & 35 *H. 8. cap. 26. sec. 115.* there is this clause, which puts this matter out of doubt: "Item, That all process for weighty and urgent causes shall be made and directed into *Wales* by the special commandment of the Chancellor of *England*, or any of the King's Council in *England*, as heretofore hath been used; any thing in this act to the contrary notwithstanding;" this shews it was the intent of the legislature to give jurisdiction to the *Grand Sessions* for less causes, and to leave the people if they pleased to come here upon weighty causes, as they had heretofore done; it seems plain to me that these courts at *Westminster* have exercised jurisdiction in *Wales* before this statute.

The *St. 29 Car. 2. c. 5.* gives power to the judges of the courts here to grant commissions to persons to take affidavits in *Wales*, and the 4 & 5 *W. & M.* the like as to special bails; what can be the use of Commissions to take bails if mesne process and original process will not run into *Wales*, it must be the sense of the parliament that such process went there.

All the courts of *Westminster-hall* exercise their authority by a power they have had time out of mind; as to the exercise of jurisdiction into *Wales*, I do admit it is a little in the dark before the time of *Hen 8.* I can find no instances of process into *Wales* in the time of the Princes thereof, except that of *David Fluellin*, there were certainly defects in the jurisdictions of the Lords of the *Marches of Wales*, that there were not in the *Principality*; for if a question arose between two Lords of the *Marches of Wales* touching the boundaries of their lands or territories, such question was usually determined in the King's courts here, and in many cases of *Dower*, where the loyalty of marriage is to be certified by the Bishop, both in the *Marches* and in the *Principality* these courts here have entertained jurisdiction.

All the courts in *Westminster-hall* are upon an equal foot with regard to the *statutes* relating to *Wales*, but it is said *subpœnas* and *quo minus's* sent *there* out of the *Exchequer* are *prærogative writs*, and are granted to the plaintiff as being the *King's debtor*; every body knows that is a mere fiction, as much as *in custodia mar' &c.* is, the court of *Chancery* here also exercises *jurisdiction* into *Wales*, and yet *there* is also a court of equity in *Wales* who have a concurrent *jurisdiction* *there*; there have been instances of *latitats* sent *there* out of *this* court, and no doubt but *mandatory writs* may go *there* from hence; and it seems admitted on all sides, that *judicial writs* will run into *Wales*. *Ireland* is no part of *England*, nor ever was, but became annexed to the crown by conquest.

A *tertenant* of lands in *Wales*, who is bound by a judgment in this court, is liable to be served with a *scire facias*, and at the same time it is said he is not liable to be served with a *latitat* of this court; this seems very strange, and I desire *Mr. Attorney General* will account for it. A judgment *here*, shall, and may lawfully be executed in *Wales*, why? because it *attaches* and binds lands and goods in *Wales*, and therefore *Wales* must be within the *jurisdiction* of this court.

Mr. Attorney General for the defendant: As to the *objection* to the *plea* made upon the former argument, I shall only say that whether there are justices, and courts in *Wales*, to administer justice, is a matter of law, and that this court must take notice there are courts of justice in *Wales*, they being taken notice of in many *public statutes*; and therefore the plaintiff might have had justice *there*, if he had thought fit.

This action is brought for the sake of trying this great question, whether the subjects of *Wales* may be drawn hither at a great expense, and the officers of this court who have freeholds in their offices be enriched, if they can prevail. There are *bounds* to the *jurisdiction* of this court, I will venture to say.

Lee Chief Justice: The law is the true *boundary* of *this* and all other courts.

Attorney General: It appears, upon the face of this record, that the cause of action arises within a county in *Wales*, and that the *venue* is laid *there*; that the defendant, at the time of the commencement of the action, was an inhabitant in *Wales*; and therefore justice might certainly have been administered in the court of *Wales*, so there can be no defect of justice, supposing *this* court shall be of opinion that this is an improper action to be brought *here*.

Antiently

Anciently, before the statute of *Rutland*, *Wales* was governed by its own princes and laws with respect to private property as between *subject* and *subject*, but, in all probability, was held *jure feodali*, as many of the Princes of *Germany* now hold their dominions; as *Ireland*, the *Isle of Man*, *Guernsey*, and *Jersey* are now held of the crown of *England*; because *Wales* was subject anciently to the *state-power*, and *state-writs*; and there is a great difference between the *Princes and great men of Wales*, being summoned to the *English parliament*, and being cited to appear in *this court*. It does not appear by any *book* of authority or *record* that *this court* before the *statutes of Wales* had any *jurisdiction* to send *original process* into *Wales*; and so I may fairly conclude it had *none*, and if it had none, it cannot be ousted of any.

But supposing *this court* anciently had *original jurisdiction* in *Wales*, yet by the *statutes* made touching it, although there are no express *negative* words, yet it appears to be the plain intent of the legislature when they erected the *grand sessions*, and settled the *process thereof*, to exclude *this court*, from several parts of the *statute*; the same is also apparent from the *maxim* of *breve domini regis non currit in Walliam*, from the law-books, and the *usage* of *this court*. The court of *Kirg's Bench* has a particular *jurisdiction* given to it by the very 34 & 35 H. 8. same *stat.* which erects and directs the court of *Wales*.

The court of *Common Pleas* has not any *original jurisdiction* into *Wales* neither in *real* or *personal* actions, nor ever exercised any, and if it has none, *this court* cannot have any; there never was any *fine* or *recovery* in the *C. B.* of lands in *Wales*, nor would any conveyancer pass such a title; there is *no curfitor* to make out an *original writ* either in *this court* or the *C. B.*

But it is objected the court of *Exchequer* sends *subpœnas* and *quo minus's* into *Wales*, and when the cause is at issue, sends it by *mittimus* to be tried in the *next adjacent county*; I must confess I do not know by what rule of law this is done. But in *this court*, this is quite a new attempt, and it is most strange if here had been an *original jurisdiction* that it never has been exercised, and therefore I may say as it never exercised any *jurisdiction*, it cannot now do it, like what was said upon the *statute of Merton* upon the disparagement of the heir by marriage, that no action could be brought for *this*, upon the *statute*, inasmuch as it was never seen or heard that any action was brought upon the *statute*. *Lit. sec. 108.* for if such action would have laid, no doubt it would some time or other have been brought.

The practice of *one court* in the hall is not to be governed by *that* of *another*, there is nothing more certain than that *they* have different

jurisdictions, and each by prescription, and have also different rules of practice, and the practice of a court is always said by the judges to be the law of the land; and the court of Exchequer, as appears by multitudes of precedents for many many years, have exercised a jurisdiction, by sending their first process into Wales without any interruption whatever, and this particular practice of that court is part of the law of the land.

But whether the court of Exchequer has such jurisdiction or not, is all one to this court, the law of one court may not be the law of another court; the Exchequer takes consue of the King's revenue, this court, of pleas of the crown, and the Common Pleas of all actions real and personal between subject and subject.

The court seemed still inclined to carry the *latitat* into Wales, but ordered a further argument.

3d Argument. Sir John Strange for the plaintiff: I shall take no notice of the objections to the pleadings, but go directly to the main question, which is, whether this court can send a writ of *latitat* into Wales, which, if I make out that they can, the plaintiff will be intitled to a *respondeas ouster*.

If I can shew that this court ever had a power to send a *latitat* into Wales, it will lie upon the other side to shew that power has been taken away.

1st, I shall consider how Wales stood before the time of Ed. 1. from whence I shall infer that this court had original jurisdiction.

2dly, I shall prove that the stat. H. 8. and the erecting of their courts upon the place, only gave them a concurrent jurisdiction with this court in Wales.

3dly, I shall maintain the jurisdiction of this court by several recognitions of authority, and shall shew that the court of Exchequer stands upon the same footing with this court, and

4thly, I shall take notice of such arguments as have before been offered for the defendant.

As to the 1st of these; England and Wales were anciently one kingdom and nation, governed by the same laws and religion, and used the same language. 2 Mod. 11. Hale's Hist. Com. Law. 219. St. of Wales. 12 Ed 1. Wales was holden of the crown of England, Dodder. 3. When Wales rebelled, they were always treated as Rebels and traitors, and not as enemies. 4 Inst. 239. and being forfeited by

by the *treason* of its *Prince* became intirely in the crown of *England* and the *stat.* 27 H. 8. c. 26. in the preamble, declares it be a member of the crown, and it may not be improperly said to be in its remitter, from hence it may be inferred *this court* had original jurisdiction in *Wales*. Salk 411.
Plowd. 118.

2dly, The establishing courts in *Wales* gave them a concurrent jurisdiction with *this court*, which they had not before, as appears from the *stat.* 12 E. 1. 27 H. 8. c. 16. f. 9. and the reason given for erecting those courts is, because the inhabitants were so far from *London*, and 34 & 35 H. 8. c. 26. gives them power to hold pleas in as ample manner as the courts here, but it is observable that the courts of *Wales* have not a concurrent jurisdiction with *this court* by this statute; whatever jurisdiction *this court* exercised in civil suits is not mentioned, but only on the crown side, and the statute can never be intended to disrobe *this court* of any jurisdiction it had before Sect. 115. of the last *stat.* is the strongest proof that *this court* had original jurisdiction, and the words *Chancellor* and *King's Council* mean the judges. 43 Affize 35. The whole of this 2d head may be reduced to this, that either *this court* had original jurisdiction and the statutes have not taken it away, because there are no exclusive negative words, or if it had not original jurisdiction; the *stat.* 34 & 35 H. 8. c. 26. sect. 115. has given it a concurrent jurisdiction.

3dly, The recognitions of the legislature, 29 Car. 2. c. 5. 4 & 5 Salk. 461. W. & M. c. 4. 11 & 12 W. 3. c. 9. 12 Geo. 1. and by St. 43 Eliz. The *Welsh* counties are contributory to the poor prisoners in the *King's Bench* prison, 11 Geo. 1. *Wales* is parcel of the realm of *England*, and a ne exeat Regno will not lie to hinder a man's going into 7 Rep. Calvin. *Wales*.

4thly, It is said the *Exchequer* has jurisdiction by prescription and by prerogative process; and I say we have here, by the defendant being in custodia Mar'. It is said the *Kings Bench* has not exercised any jurisdiction; I answer, neither did it, till lately, send writs of latitat to the *Cinque ports*. There is a jurisdiction into *Wales* in some of the courts in the hall, as in the *Exchequer*, and if there has been such an usage in any court, all the *King's high courts* must have the same, which is an answer to Co. Lit. 81. cited by Mr. Attorney General; it is laid down by the other side as a maxim of law quod breve domini regis non currit in Wallia; this saying is explained by Judge Atkins, 2 Mod. 12. and cannot mean that no writ at all runs into *Wales* out of *Westminster-hall*, for the contrary is admitted on all hands. 4 Inst. 531.

It is objected by the defendant, that jurisdiction is given by statute to *Westminster-hall* as to the county of *Monmouth*. I answer, *Monmouth* is made a part of *England* to every intent and purpose.

It is objected that the *stat. Ed. 6.* gives the courts *here* power to award *writs of exigent* into *Wales*, from whence it is inferred they can send no other *writs there*; I answer, this proves too much, because it is agreed on all hands that many *writs go*, as *executions, &c.* or there would be a failure of justice: this *statute* mentions, that the sheriffs of *Wales* shall have deputies *here*, to receive all *writs* issuing out of the *K. B.* and *C. B.*

Gundry for the defendant: All the gentlemen who have argued for the plaintiff have begged the question, and taken it for granted that *this court* had *original jurisdiction*; saying, pray tell us how it is taken away. Now it is most certain that in the space of 450 years *this court* never sent any *latitat* into *Wales*, and if *long usage* will give *jurisdiction*, the same *non-usage* is the strongest proof against *jurisdiction*.

1. *Wales* was no part of the realm of *England*, neither *before* nor *after* the *stat. 12 E. 1.* until the 27 *H. 8.* nor had the laws of *England* any place *there*, from whence it will follow that *this court* had no *original jurisdiction*, though I admit it to be part of the *dominion* of the crown of *England*.

2. This court never claimed, or exercised any *concurrent* or *exclusive jurisdiction* in *Wales*, except in some things, and in *those*, only between the *Lords Marchers*.

3. By the *Stat. of union*, or any other recognition, this court has not been admitted to have any *original jurisdiction*, and the 115 *sec.* of 24 & 25 *H. 8.* means quite another matter, the words *weighty causes*, and the words *King's council*, do not mean the Judges here.

4. I will shew the difference between counties *Palatine*, *Cinque Ports*, and *Wales*.

5. Then I shall answer the objections, as they fall in my way.

N. B. Mr. Gundry set out in his argument in this methodical way, but did not pursue it.

David Fluellin was not tried at *this bar*; *Lord Co. 4 Inst. 239.* mentions no such thing, but most probably was tried in *Wales* by the *King's Commission*. *Doctor Watton on Welch laws, fo. 518.* speaks of commissions into *Wales* in extraordinary cases *temp. Ed. 1.* which shews that *this court* had no *jurisdiction*.

The *Princes* of *Wales* were antiently *Kings of Wales*, 4 *Inst. 239, 243.* and *King Edward* claimed the same *feudal sovereignty* over *Scotland* as he did over *Wales*. *Ryley's Pl. in Parl. 157.* This appears in the case between the *Kings of England* and *Scotland*; there is one thing particular in *that record*, that it appears to be *coram domino Rege*

Rege & concilio suo, and the judges, which serves to explain what is meant by the King's council in the stat. 34 & 35 Hen. 8. c. 26. f. 115. the same book fo. 145. in the same year, and to the same purpose. Edward the first, before the St. of Snowden, plainly treated Wales as a conquered country; and in the 3 Ed. 1. c. 17. which provides remedy in cases of distress, it is said at the latter end of it, and this is to be intended in all places where the Kings writ lieth, and if that be done in the Marches of Wales, or in any other place, where the King's writs be not current, the King which is Sovereign Lord over all shall do right there unto such as complain; and that is because a replevin would not lie here.

Before the *stat. H. 8.* all the lands in *Wales* were held and governed by the laws of *Wales* and not of *England*. *Co. Ent. Quo Warr. 549. 4 Inst. 244.* And the writs run *contra pacem* of the Lord Marcher, and the Lords Marchers had judgment of life and limb. *27 H. 8. c. 24 Ryley 63, 141.* They had power to hold plea in all actions real and personal, nor could the King *intromittere*, which is the very expression in *Coke's Entries*.

There were two sorts of causes wherein the King's Bench had jurisdiction, one was, where the Lords Marchers themselves were parties, and the other in cases of *quare impedit*; the first was, because none can be judge in his own cause, the other, because no writ laid to the bishop, or he would not obey it, because he thought himself as great a man as a Lord Marcher.

To shew that *Wales* was no part of *England*, that this court never exercised any jurisdiction there, except in cases where lands were held of the King, and except as above, and to shew the difference between *Wales* and *Counties Palatine*. *Fitz. Jurisdic. 34. 26 H. 6. 34. 3 Ed. 3. 19. 40 Ed. 3. 1. 11 H. 6. 3. 19 H. 6. 12.* Writs of error always laid from counties palatine, but not in *Wales*, before *34 Hen. 8.* because *Wales* was no part of *England*, but counties palatine always were.

It is said the *stat. H. 8.* gave this court jurisdiction by introducing the laws of *England* into *Wales*: I answer it did not, for *Poyning's law*, which introduced the *English* laws into *Ireland*, did not give the courts here jurisdiction in *Ireland*.

Between the *27 & 34 Hen. 8* (which last *stat.* gives the writ of *Stat. 5 Eliz. error in real and mixt actions*) no writ of error was brought in this ^{c. 23.} court, and if it had original jurisdiction there would have been no occasion to give the writ of error by the statute *34 H. 8. sec. 103.* and as error was thus given in real actions and mixed, so by the *St. W. 3.* it was also given in personal actions.

PART I.

G g g

The

Ryley 98,
211.

The gentlemen on the other side would have *weighty causes* in the *stat. 34 & 35 H. 8.* to be understood to mean *all causes*, but I have already shewn they do not; they would also have *King's council* to mean the *Judges*; but it is well known that in *Hen. the 8th's* time it meant the *King's Privy council*, and sometimes *the house of Lords*, as the *great council of the nation*, the *Judges* at that time were never mentioned as the *King's council*, but were known by the name of *his Justices* or *Judges*, whatever they might be anciently styled.

It is objected that *this court* and the *Common Pleas* send *executions* into *Wales*, and therefore why may they not send *first process* thither? I answer, there has been *long custom and usage* in the one case, and without *it*, there would be a failure of justice, but in the *other* there has been *no usage* at all; and *Wales* has *superior courts* of its own. And as to the *Exchequer*, the *King* and his *debtors* have always had *prærogative process* into *Wales*, which has never been disputed.

Here ends the substance of the first three arguments, the last whereof was in *term Pasch. 19 Geo. 2.* when the court ordered this case to stand over for judgment; and some of the parties either died, and the suit abated, or the clerks of the office of pleas in the *Exchequer*, who were much interested in this question, and were afraid the court would over-rule the plea, put an end to the cause, but a new action was forthwith brought in the name of *Jones v. Jones*, wherein there were exactly the same pleadings as in the case of *Lampley v. Thomas*, which was argued at the bar in last term; but as the subject had been quite exhausted before, nothing more that was new could be said upon it, and so the court, in *this present term*, gave judgment for the defendant and allowed the plea, without saying more than these words, *viz. Breve domini Regis de LATITAT non currit in Wallia.*

2 Q/B1

Rex versus The Bishop of Chester. B. R.

A mandamus lies not to a visitor, who has deprived a prebendary for incontinency.

RULE to shew cause why a *mandamus* should not go the *Bishop*, commanding him to restore the Reverend Mr. *John Prescott*, Master of Arts, to the place and office of one of the *Prebendaries* or *Canons* of the cathedral church of *Chester*.

This rule is made upon the affidavit of Mr. *Prescott*, who swears that the *Bishop of Chester* for the time being is visitor appointed by *Hen. the 8th* who was the *founder*, and that he (Mr. *Prescott*) was collated to the *Prebend* by a former *Bishop*, and that the present *Bishop* had decreed in his *visitatorial court* that Mr. *Prescott* ought

to be punished, expelled from, and deprived of his *Canonry* or *Prebend* for *fornication* and *incontinency*, and that Mr. *Prescott* was deprived of it accordingly. The affidavit also set forth some of the *Founder's statutes*, and amongst the rest, one titled *De corrigendis excessibus*, by which Mr. *Prescott* insists that it appears he ought to have been *three times admonished* against the crime he had been deprived for committing, and that not having been *thrice so admonished*, that the bishop had no power to *deprive* him.

Sir *Richard Lloyd* against a *mandamus*: *Mandamus's* are issued by this court to command persons to do *that* which is their duty to do, but if the court does not know *what* is the *Bishop's duty* in the present case, it is absurd to apply for a *mandamus*; and unless the crown has made this court the *visitor*, it cannot intermeddle; on the contrary it appears the *Bishop* is *visitor*.

But Mr. *Prescott* objects he has not been *thrice admonished* against his crime; What? does a *Clergyman*, who ought to *instruct* and *admonish* others, want to be *thrice admonished* himself against being a whoremaster?

Suppose the *founder* has given them statutes which the *visitor* has not exactly pursued, yet, as the members of this church are, among themselves, a private body, and the King has given this private body a Judge who has absolute power, as to church government, over them, *this court* will not interfere, and upon the *return*, if it appears there is a *visitor*, *this court* will not grant a *peremptory mandamus*, *Doctor Witherington v. Corp. C. C. Cambridge*. And *Holt's* opinion in *Phillips v. Bury*, *Skin.* 475. against the opinion of the other three Judges was established in the *house of Lords*. 1 Sid. 71.

Mr. *Gundry* against a *mandamus*: There is neither reason nor precedent for making this rule absolute; the *sentence* complained of, is *deprivation* by the *Bishop*, whom Mr. *Prescott* admits to be the *Visitor*; by the *sentence*, which is not denied to be true, it appears Mr. *Prescott* has been guilty of gross immorality, and now he comes *here* for redress, without denying the truth of the *sentence*. 100

If there had been a want of *jurisdiction*, or if the *Bishop* was proceeding contrary to the *statutes* of the *founder*, Mr. *Prescott* ought to have applied for a *prohibition before sentence*, for no case of a *mandamus* after *sentence* can be cited. 1 Sho. 74.

In *Phillips and Bury*, the point of the case was, and what the *house of Lords* gave judgment upon, that the acts of a *visitor* are not examinable in the *courts of Westminster-hall*, and *this* has not been since denied; for the law gives great credit to the acts of a *visitor*. *Kenn's case*, 7 *Rep.* 44.

The

The King v. Doctor Walker, Hil. 9 Geo. 2. Mandamus to Doctor Walker, Vice-Master of Trinity College in Cambridge, to execute a sentence of deprivation against Dr. Bentley who had been removed; Doctor Walker returned that the King was founder, and had appointed the Bishop of Ely Visitor, and the question was, whether a peremptory mandamus should go; and *per curiam*, the mandamus was quashed, because it was to a *forum domesticum*.

Doctor Sberlock's case was a mandamus to restore him to a Prebend of Norwich, which he was intitled to, as being Master of Catbarine Hall in Cambridge; and the reason the court gave for granting the mandamus in that case was, because *this* Prebend was annexed to the Mastership of Catbarine Hall by act of Parliament, which made it a kind of a lay-fee, and the court granted a peremptory mandamus, because there was no visitor returned.

It is objected Mr. Prescott has been deprived contrary to the statutes of the founder; to *this* I answer, there is no case wherever *this* court examined the legality of a deprivation by a visitor.

Mr. Henley against a mandamus: *Lib. Affiz.* 8 Ed. 3. p. 29. every Guardian of an Hospital, if it be lay-fee, is visited by the Patron, if it be spiritual, by the Ordinary, and if he be deprived by the visitor he shall not have an *affize*. More modern cases have proceeded upon the same principle, for the visitor has always been considered as absolute Judge in all cases of this kind, unless an act of parliament has intervened and made it a public thing.

But it is said on the other side, that it appears the Bishop is only a partial visitor, and that there are necessary steps to be taken before he has jurisdiction to deprive, which have not been taken in the present case; and this objection is founded on the statute *de corrigendis excessibus*; in answer to this, it appears by the statutes that the Bishop is to visit *si rogatus vel non rogatus*, and is to take care that the statutes be duly observed, and to punish according to the crimes committed, and to do every thing which appertains to the visitatorial office.

Sir Thomas Bootle for a mandamus: I admit the Bishop is appointed visitor, but his power to deprive is limited and circumscribed, for he must admonish three times before he can deprive, and a Prebend is a freehold for life, and not a mere spiritual office; and therefore if he be deprived of his stall, why should he not have a mandamus to be restored to it, as well as a schoolmaster or usher, who are for life. 2 Sid. 112.

If any court holds *jurisdiction* where they have none at all, their proceedings are void. *Hob. 63.* a *visitor* stands upon the same foot if he goes beyond his *jurisdiction*.

Suppose an *ejectment* was brought for any part of the lands belonging to *this stall*, the court must examine into the legality of the deprivation; *Holt C. J.* in *Phillips and Bury*, does not say to the contrary. And if a *Visitor of a college* refuses to visit it, this court will compel him by *mandamus*. This motion was made in the last term, when the court said what follows.

Lee Chief Justice: The difficulty with me is the manner in which *Mr. Prescott* now applies; I think, (as at present advised) he ought to have applied for a *prohibition* when the matter was under consideration before the *Bishop*; there is no doubt but *this court* will interpose in one way or other whenever any person takes upon him to exercise a *jurisdiction* which he has not, but in the present case it is admitted the *Bishop* is *Visitor*, which I think, has always been held to be a flat objection to *this court's* granting a *mandamus* in the like case; besides, I do not know that any *mandamus* was ever granted after a sentence of this sort; and *Mr. Prescott* may have another remedy by an *ejectment*, and so was the case of *Phillips and Bury*.

Wright Justice: The case of *Broad Oaks, Hil. 12 Ann* he was a *Fellow of Winchester College*, and was expelled by the *Bishop*; the question, was, whether the *Bishop* was *Visitor*; the court on the motion refused to grant a *mandamus* to restore him, but by consent a *prohibition* went to try that point; this is my note of that case.

Dennison Justice: If we should grant a *mandamus*, and it should appear that the *Bishop* is *Visitor*, (which that he is, is admitted on all hands) we could not grant a *peremptory mandamus*, the consequence of that must be, that *Mr. Prescott* must bring an *action for a false return*, wherein he must fail, therefore I think it most proper to try it in an *ejectment*.

Then the court adjourned it until *this term* for consideration.

Lee C. Justice: We are all of opinion, upon full consideration, that this rule must be discharged, and that the *Bishop* may exercise his visitatorial power (as he has done in this case) *without admonishing the party thrice*; where it does not appear whether there is a *Visitor* or not, this court has granted a rule to shew cause, but when it appears there is a *Visitor*, this court cannot intermeddle; and we think the *Bishop* had *jurisdiction* notwithstanding the statute *de corrigendis, &c.*

Rule for *mandamus* discharged.

PART I.

H h h

Subley

Subley *versus* Mott and another. B. R.

There is a difference between an action of conspiracy against two persons and an action upon the case founded on a wrong done by two persons; in the first, if one be found Not guilty the judgment must be arrested, but not so if one be found Not guilty in the latter case.

THIS is a *special action upon the case* against two persons for a *malicious prosecution* carried on by them against the plaintiff, in causing her to be indicted without any *probable cause*; and the jury found *one* defendant *guilty*, and the *other* *Not guilty*.

It was now moved in arrest of judgment by Mr. Smythe, who objected that the action does not lie against *two*, for the malice of *one* person is not the malice of *another*; and cited *Bro. Joinder in action*, p. 6. 15, 27, 41. and *Lowfield v. Bancroft & al'*, Trin. 5 Geo. 2. which was an *action for a malicious prosecution*; the jury would have found 800*l.* damages against *one* defendant and 100*l.* against *each of the others*, but the Chief Justice saying it could not be done, the jury gave a verdict with 1400 damages.

But supposing this kind of action will lie against *two* when they are guilty of a joint offence, whether they must not *both* be proved guilty? I submit it they must, and it is not like *trespass* against *several defendants*, where *one* may be found guilty and the *rest* not so, and well enough.

Upon an *assumpsit* to do two things, if the defendant says that he assumed to do *two other things*, *absque hoc* that he assumed to do the *two things before alledged*, upon which they are at issue, and the jury find that he assumed to do the *one* but not the *other*, this is found against the plaintiff, for it is not the *same promise* that is alledged in the declaration. 2 *Rol. Abr.* 703. p. 12

In a *præcipe quod reddat*, if the issue be, whether *A.* and *B.* *enfeoffed* the tenant, and it is found that *A.* *enfeoffed* him, and not *A.* and *B.* this is found against the tenant *in toto*, who affirms that *A.* and *B.* *enfeoffed* him. 2 *Rol. Abr.* 706. p. 36.

In an action by *two* churchwardens, if the defendant plead that at the day of purchasing the writ they were not church-wardens, and the jury find that *one* of them was, but the *other* was not; this is found for the defendant, for *they* were not church-wardens. 2 *Rol. Abr.* 706. p. 38.

If a *contract* be alledged to be made with *two* jointly and *usu-*
riously, and it is found that the contract was made only with *one* of
them, the plaintiff shall not have judgment upon this verdict, for it
is not the *same contract*; upon this motion a rule was made to shew
cause why the judgment should not be arrested in the last term.

And

And Mr. Ford for the plaintiff came *this term* and shewed cause, and insisted that this is not an *action of conspiracy*, which is a formed writ in the Register, but is a *special action upon the case* founded on a tort done to the plaintiff by two persons who charged her with felony, caused her to be indicted and tried; whereof she was acquitted; and in an *action* founded upon a tort the plaintiff is not bound to prove the whole matter laid in the declaration. In the case of *Jones v. Gwynne*, Hil. 12 Ann. before Lord Parker, this difference was holden between an *action of the case on contract*, and on a tort; in the first, the whole contract must be proved, in the latter so much will do as proves the plaintiff had a good cause of action; if this had been an *action of conspiracy*, brought upon that particular writ which only lies against two or more persons, it might have had another consideration, but as this is an *action on the case* founded on a wrong, it will lie against one or more persons, like an action of trespass, and if any of them be found guilty, the plaintiff shall have judgment; and of that opinion was the whole court; and said, that this point has been often determined since the case in 1 Saund. 228. Vide 1 Rol. Abr. 111. p. 5. T. Raym. 176. 5 Mod. 408. Cro. Car. 239. Latch. 80, 262.

F.N.B. 26.
Writ of conspiracy.

Easter Term

21 Geo. 2. 1748.

Morrough *versus* Comyns. B.R.

GARNEY, one of the captors of a prize ship being intitled to a certain proportionate share of the goods taken (which have since been sold by the ship's agent) on the 24th of August, 1745. made a bill of sale of his share to the plaintiff, who brought this action against the ship's agent Comyns for money received for his use, and upon the general issue there was a verdict for the plaintiff. And it was now moved for a new trial, and objected that at the time of making the bill of sale, Garney had nothing in the prize that he could grant or assign, because the statute 17 Geo. 2.

A captor of a prize assigns his share therein before condemnation, and held he could legally do it.

fo.

fo. 693, 4. which gives these prizes to the captors, says, that they shall be divided amongst the captors as shall be agreed on by the owners, being first deemed lawful prize, and this was not deemed lawful prize until September 1745. which was after the making the bill of sale.

It was insisted by Sir Richard Lloyd and Mr. Ford for the plaintiff, that the statute gives the property of the prize to the captors instantly upon the taking thereof, and that the sentence in the Admiralty only confirms that property.

If a man delivers a deed as an escrow to be delivered to the grantee, when the bailee has delivered it, it has its effect from the first delivery. So if a bargainee of lands before inrollment makes a grant of the lands to another, and afterwards the first deed of bargain and sale is enrolled, it is good. 2 Inst. 675. Cro. Jac. 52. Hob. 220, 221. for whenever two things are necessary to be done to perfect a deed, &c. when those two things are done the deed shall be effectual from the doing the first act; this is always true in the case of privies. So in the case at bar, after sentence of condemnation in the Admiralty the property of the prize must be considered as absolutely and legally vested in the captors from the instant of taking thereof, between Landen v. Pickering, Mich. 18 Geo. 2. B. R. there was a warrant of attorney to confess judgment, and a release of errors in the same deed, and it was held that the release should operate upon that judgment when entered, and that the judgment should be considered as prior in time.

2 Ro. Abr.
399.
Relation.
2 Leon. 196.
Anonym.

2 Stra. 1215.

If a man to day conveys land the property of another, and to morrow gains the property thereof, he shall be stopped to say he had nothing in the land when he granted it.

On the other side it was insisted by Mr. Hume Cambell, Mr. Henley, and Mr. Comyns for the defendant, that every prize taken by a privateer from the King's enemies, is, by the law of nations his majesty's property, which, by a public law he has been pleased to give to the captors in a particular manner, viz. being first deemed lawful prize, so that all the right the captor has, is by the statute. That although the plaintiff by the assignment of Garney might have an equitable right, yet he had not a legal one, for no man can make a legal conveyance of that which he has not at the time of making it. Co. Lit. 265. So in the case of a will, if a man devises all his lands, and after the making his will purchases others, those lands after purchased shall not pass.

If two jointenants be of certain lands, and one of them by deed indented bargains and sells the lands, and the other jointenant dieth,
and

and then the *deed* is inrolled, there shall pass nothing but the *moiety*, which the *bargainor* had at the time of the bargain. *Co. Lit.* 186.a.

And although in the case of a *bargain and sale* the estate vests in the *bargainee ab initio*, as soon as the *deed* is inrolled, yet *that* is by the *stat. 27 Hen. 8.* of uses, which doth join all the estates to the *uses ipso facto*; the *stat. of inrolments* only says, that the estate shall not vest except the *deed* be inrolled; so that if it be inrolled it doth vest, not by the *statute of inrollments*, but by the *statute of uses presently*; yet it was agreed that the *bargainee* cannot sell unto another, before his own *deed* be inrolled; as was adjudged in *Bellingham's* case. *Hob.* 136.

An estate vests in the bargainee by the statute of uses, not by the statute of inrolments.

Q. Cro. Jac. 52. and 2 Leon. 196.

Lee C. Justice: I was of opinion at the trial, that this action well laid for the *assignee* of the *captor* against the defendant who was the ship's agent, and the whole court is of the same opinion now; for the words in the statute, *being first deemed lawful prize*, are no more than what would have been implied if they had not been inserted; it is no condition *precedent*, for whenever the ship is deemed lawful prize by the court of *Admiralty*, the property must be considered as immediately vested at the instant the ship was taken.

Wright Justice: At common law the *subject* in time of war was intitled to the property of whatever he could take from the King's enemies, and we are to be governed by *that*, and not by the *law of nations*; and to prove *this* I shall cite the best books of authority. *Regist.* 102. b. *Bro. tit. Property*, pl. 18, 38. So the court refused to grant a new trial, and ordered the *postea* to be delivered to the plaintiff.

Case in temp. W. 3. 135. King and Brown.

The subject in time of war is intitled to the property of what he takes from the enemy, by the common law.

N. B. By the *stat. 20 Geo. 2. fo. 59.* These bills of sale of prizes before condemnation are made void.

Moor and Lynch. In Error. B. R.

THIS was error upon a judgment in debt on a bond in the penalty of 1470*l.* Mr. Ford for the plaintiff in error moved to justify bail, each in 1470*l.* Sir John Strange on the other side insisted that the bail ought each of them to justify in double the sum the judgment was given for; but *per curiam*, The sum recovered is double the debt really due, and, it is sufficient for the bail to justify each in the sum of 1470*l.*

Bail in error on a judgment in debt on a bond, each bound in the sum recovered, it being double the sum due.

Musgrave, on the demise of Hilton, *versus* Sir John Shelley. B. R.

Plaintiff's lessor enters, afterwards defendant levies a fine, then an ejectment is brought, and the demise laid before the fine, and well enough

AT a trial *at bar* in *ejectment* the lessor of the plaintiff proved an *actual entry* into the lands made by him the 7th of September 1744. and the demise in the declaration is laid on the 1st of October 1744. It was objected for the defendant that he had levied a fine of the lands in *Easter term* 1745. since which time this *ejectment* was brought, and that to avoid that *fine* the *entry* of the plaintiff's lessor in September 1744. is not effectual; but *per totam curiam*, The lessor, by his *entry* in 1744. gained to himself a title sufficient to enable him to make the lease in the declaration to have his title tried.

Rex *versus* Haines, for an assault and maihem. B. R.

The benefit of the act of grace allowed to a defendant after he had omitted to pray it at his trial, on payment of full costs.

AN *information* of *Easter term* last; upon Not guilty pleaded, was tried at the last summer assizes for the county of *Worcester*, when the defendant did not think proper to pray the benefit of the late *act of grace*, whereupon the judge proceeded to try the *information*, and the jury found the defendant guilty, who in *Michaelmas term* last moved that he might have the benefit of the act upon payment of costs.

Mr. *Batburst* for the King objected, that as the defendant did not think fit to pray the benefit of the *act of grace* at the time of the trial, he came too late; and cited *Hawk. P. C. Lib. 2. c. 37. f. 50. Kelyng 24, 25. Jenk. Cent. 129. Hales 8^o. 252. and Ratcliffe's case ante*, wherein the court refused to let him plead the *act of grace* after he had pleaded he was not the *same person* who was tried and convicted for high treason in the year 1715.

Mr. *Evans* for the defendant said he pleaded Not guilty in *Trinity term*, and the *act of grace* did not pass till the end of it; and that the practice of the *Old Bailey* is to plead *guilty*, and then to pray the benefit of the *act*, which a man has no occasion for before he has confessed himself, or been found guilty by the jury.

The court took time to consider until this term; and now were of opinion that the defendant was intitled to the benefit of the *act of grace*; but ordered that he should pay the prosecutor full costs out of pocket, and gave particular directions to the master accordingly.

The Bishop of Meath *versus* Lord Belfield. In Error.

QUARE *impedit* brought in the *Common Pleas* in *Ireland*, where-
 in Lord Belfield was plaintiff, and the Bishop of Meath de-
 fendant; the title made by the plaintiff in his declaration is, that
 the Earl of Roscommon was seised in fee of the *advowson* of the rec-
 tory of the church of C. in the diocese of Meath in gross; and being
 so seised presented one Nicholas Knight as his clerk, who was insti-
 tuted and inducted in the year 1696. that in the year 1707. Lord
 Roscommon granted the *advowson* to an ancestor of Lord Belfield,
 under whom he derives his title; that upon the death of a former
 incumbent Lord Belfield not presenting in time, the Bishop of Meath
 presented Benjamin Hogshaw by *lapse*, who being now dead, the
 plaintiff below says he presented A. B. as his clerk, but the Bishop
 refuses him.

Evidence.
 Where a
 blank is left
 in the Regi-
 ster of an in-
 stitution or
 collation for
 the patron's
 name, parol
 evidence of
 common re-
 port to prove
 who was the
 patron is ad-
 missible.

The Bishop pleads he is intitled to the *advowson* in right of his
 Bishoprick, and that the late Bishop collated Hogshaw as his clerk;
 that Hogshaw being dead, he collated Smith the present incumbent
absque hoc; that the late Earl of Roscommon was seised in fee, where-
 upon issue was joined; so the single question to be tried was, *whether*
the Earl of Roscommon was so seised; and in order to prove it,
 Lord Belfield's counsel at the trial produced the Bishop's register book
 of the year 1696, in which the institution of Knight was entred,
 whereby it appears that Knight was instituted *ad rectoriam præ-*
dictam per resignationem Johannis Twelves, but there is a blank left
 for the name of the patron, and in this instrument in the book
 there are these words, *nominamus ordinamus facimus admittimus &*
instituimus N. Knight ad rectoriam prædictam uni cum omnibus mem-
bris curamq; animarum, &c. it not appearing clearly who was the
 patron, because of the blank for his name; the Lord Belfield's coun-
 sel offered to support their case by parol proof that it had always
 been the common reputation of the country that the Earl of Roscom-
 mon was seised of the *advowson*, and presented Nicholas Knight; to
 which the Bishop's counsel tendered a bill of exceptions which was
 sealed by the judge who tried the cause, which was afterwards ar-
 gued, and judgment was given for Lord Belfield, which the King's
 Bench in Ireland has affirmed, and now a writ of error is brought
 here. It also appears upon the face of this record that in the time of
 King William 3. there issued a commission to the Bishop of Meath to
 enquire and certify what clerks were incumbents, &c. within the
 diocese, and by the Bishop's certificate or testimonial it appears that
 Nicholas Knight was incumbent of this church on the institution or
 collation of somebody, but it doth not appear upon which, or by whom.

This

This question, whether the *parol* evidence excepted to, be *legal evidence* to prove a *seisin in fee* in *Lord Roscommon*, or be admissible under the circumstances of this case, was argued by Mr. *Joddrel* for the *Bishop*, and Sir *Thomas Bootle* for Lord *Belfield*, and after time taken to consider, *Lee* Ch. Justice, *Wright*, and *Denison*, agreed that it was admissible; *Foster* Justice *contra*.

By three Judges, *instituimus* is a very ambiguous word, and there are many cases shew it to be as well applicable to a *collation*, as an *institution*, so that the entry in the *registry* was some evidence of an *institution*, as well as of a *collation*, and is strengthened something by the *commission* and *certificate* in the time of *W. 3.* the return whereof was made from the *registry*; therefore as this written evidence might be either an *institution* or a *collation*, surely the *parol* evidence was very proper to shew *which* it was, and being a matter *sub judice*, was fit to be left to a jury; and judgment for Lord *Belfield* was affirmed.

Goodall's Case. B. R.

Serjeant in the guards cannot be arrested under 10 l.

GOODALL. a *serjeant in the guards*, was arrested in the *palace court* for a less sum than *ten pounds*, and being brought here by an *habeas corpus*, was discharged out of custody upon the *mutiny act*; for *per curiam*, A *serjeant* is enlisted as a volunteer, and is only a *serjeant* by *parol* of the *colonel*, and is reducible to a private man whenever the *colonel* pleases, so cannot be arrested under 10 l.

Townsend *versus* Ives. At the Rolls, May 9, 1748.

All the three witnesses to a will must be examined if living.

THIS was a bill preferred by the legatees under the will of *John Townsend*, in order to have his real estate sold for payment of their legacies, which are charged thereupon, against the heir at law of the testator who is an infant, and to have the will established. There were *three* witnesses to the will *all* now living, but only *one* has been examined, who proved the execution of it, and the attestation of the other *two* witnesses. But *his Honour* refused to establish the will without the examination of all the witnesses, for it is a *rule* that *all* the witnesses if living must be examined to prove the *will*; besides the heir at law is, in this case, an *infant*, who, if of age, has a right to cross-examine all the witnesses, and as no admission of this sort can be received for an infant, this court must protect his right, and therefore must insist upon all those requisites which he would have a right to insist upon if he were of age, and capable of making a defence for himself.

Trinity Term

21 & 22 Geo. 2. 1748.

Ramfden and another *versus* Mackdonald. B. R.

THE defendant being a native of *Great Britain*, in the year 1740. was a *banker* at *Paris*, and upon *May 31, 1740* executed a bond to the plaintiffs in the penalty of 2000*l.* conditioned for the payment of 1000*l.* in *May 1742.* and being so indebted came into *England*, and has been lately convicted and attainted of *high treason*, and being in prison under such conviction and attainder, on the *26th of March* last an *affidavit* was made that the defendant is indebted to the plaintiffs for principal and interest on bond in the sum of 1200*l.* and thereupon application was made to Lord Ch. Justice *Lee* for leave to charge the defendant in custody with a writ at the suit of the plaintiffs, who granted leave accordingly

One attainted of treason may be charged with a civil action.

And in last *Easter* term it was moved for the defendant by Mr. *Attorney General*, Sir *John Strange*, and Mr. *Sollicitor General*, that the defendant might be discharged out of the custody of the sheriff of *Surry* as to this action at the suit of the plaintiffs; upon a suggestion that *this* was an infringement of the King's *prærogative*, for that the King intended to pardon *Macdonald* upon condition of his transporting himself out of his Majesty's dominions and never returning again, and that it was impossible for him to perform the condition if the court should suffer him to be thus charged by the plaintiffs; the court made a rule to shew cause, and this term cause was shewn against the defendant's being discharged by

Mr. *Henly* for the plaintiffs: It was insisted, *last term*, that the King had power over the defendant's body and goods; but it appears by Lord *Coke's 3 Inst. 215.* that although judgment be given against a man in case of *treason*, yet his body is not forfeited to the King, but until execution remains his own; and therefore if he be slain before legal execution, his wife shall have an *appeal*, so that he cannot be said to be *civiliter mortuus*, for he may purchase lands to him and his heirs, may be charged in *execution* at the suit of a *subject*,
 PART. I. K k k and

1 Sid. 90,
 211.
 T. Raym. 53.

and shall be compelled to answer at other mens suits, and shall not be permitted to plead the *attainder*; this does not at all affect the *prærogative* of the crown, for the King may pardon *absolutely* or *conditionally*, but not *conditionally* so as to hurt an innocent creditor. In the case of *Bannister v. Trussel*, Cro. Eliz. 516. it is determined that one *attainted* could not plead his *attainder* in an action of debt, but was obliged to answer, by *three* judges against *one*, which opinion has ever since been adhered to. 1 Sid. 139. 1 Keb. 649. Sir Cha. Stanley's case 723. Noy 1. Moer 753.

Foxworthy's case, Salk. 500. was relied upon for the defendant; but it is very different from the case at bar; *Foxworthy* came to the bar and pleaded his *pardon*, which was allowed, whereupon some of his creditors that instant moved for leave to charge him with actions; the present case is of a person regularly charged before any *pardon* be pleaded, *Foxworthy's pardon* being allowed, he was no longer in custody of the *Marshall*, so could not be charged.

Vide 1 Lev.
124, 146.

It is objected the *pardon* is not for the benefit of creditors; but this I deny, for by the operation of law it is clearly for their benefit.

Dyer 245.

It formerly used to be a trick for persons greatly indebted to get themselves indicted for some crime within the *benefit of clergy*, to defeat their creditors by pleading they were *attainted*, and so not obliged to answer, but it has ever since been held, that a person *attainted* may be sued.

This court will permit *bail* for a defendant in a *civil suit* (who becomes *attainted*) to bring him into court by a *habeas corpus*, and to surrender him to the *Marshall* for a moment in discharge of themselves, and then will remand the criminal to *Newgate*, as was done in the case of the *bail of Peter Burgeyne*

Lee Chief Justice: There is no doubt but a person *attainted* may be sued; leave has been given by me to charge the defendant, and therefore you must move to discharge my *order*, before you can do any thing, for while *that* stands the defendant is regularly charged; therefore the present rule to shew cause why the defendant should not be discharged at the plaintiff's suit must be discharged, which was so ordered *per totam curiam*

Ryley *versus* Parkhurst and two others, B. R.

TRESPASS for taking and impounding the cattle of the plaintiff at *Teddington* in the county of *Middlesex*. All the defendants plead the general issue, and thereupon issue is joined. Two of the defendants plead another plea, (without saying by leave of the court) that one of them is seised of a certain close at *Kingston* in *Surry*, and the other as his servant, and justify the taking the cattle there *damage-feasant*, and that they drove them to, and impounded them at *Teddington*, as it was lawful for them to do. The plaintiff demurs, and therein says that the plea is uncertain, informal and double, but does not say what the *duplicity* is.

Trespass at *Teddington*; defendant justifies for *damage feasant* at *Kingston*, and that he impounded the cattle at *Teddington* good without a traverse. Duplicity in a plea must be pointed out.

Lawson for the plaintiff: 1st, This is a double plea, for the general issue is an answer to the whole declaration, and the other plea is not said to be *with leave of the court*.

2^{dly}, the *damage feasant* is *local* and the defendants ought to have traversed the taking and impounding at *Teddington*, or any where else than at *Kingston*. *Cro. Eliz.* 705. 2 *Lutw.* 1435. *Benjamin v. Howell*, *Mich.* 18 Geo. 2. *ante* 81.

Serjeant *Bootle*, *contra*: As to the 1st objection, *Bartholomew v. Ireland*, *Mich.* 11 Geo. 2. B. R. *Trespass* for breaking and entering plaintiff's chambers in *Staples-Inn*, the defendant pleaded several pleas without saying by *leave of the court*, which was shewn for special cause of demurrer; but the court only said it was an irregularity, and held it good on a demurrer, Sir *John Strange* was for the plaintiff, and *myself* for the defendant, who had judgment, and the *duplicity* must be pointed out by the demurrer, which is not done here. *Sa k.* 219. *Comyns.* 115.

As to the 2^d objection: The *justification* is a good answer without a *traverse*, for the impounding at *Teddington* is a detaining and taking at *Teddington*, and to have *traversed* the taking at *Teddington* would have been a good cause of demurrer; or if issue had been joined on such a *traverse*, the defendants must have been gone for the reason aforesaid; and of this opinion was the court in both points, and judgment for the defendant *per totam curiam*.

Vide post. *Ter. Mich.* 8 Geo. 3. *Walton v. Kerfop.*

g. if the Dist ought to have carried the trespass into the county.

Smith

Smith on the demise of Taylor *versus* Mann. B. R.

Ejectment where the landlord is made defendant the plaintiff must prove his the defendant's tenant in possession of the premises in question.

EJECTMENT for three houses at *Deptford* in *Kent*; the case reserved at *Nisi prius* for the opinion of the court was thus stated, *viz.* That *Richard Mann* in 1741. demised the premises to *A. B.* for 500 years by way of mortgage, to whom the plaintiff's lessor is executor; the mortgage becomes forfeited, and this *ejectment* being brought, the defendant obtained a rule to defend as *landlord* in case the tenant did not appear; and at the trial it was insisted upon for the defendant, that the plaintiff ought to prove that the defendant or his *tenant* was in possession of the premises in question, and failing in *that*, Mr. Justice *Burnett*, who tried the cause, was of opinion the plaintiff had failed in proving his case, but reserved it for the opinion of the court; and now upon debate it was held clearly *per curiam*, That it was necessary to prove the defendant or his *tenant* in possession of the premises, for the rule is, that the *landlord* shall defend for the premises only whereof his tenants are in *possession*, and the party does not admit himself to be *landlord* of any premises which the plaintiff may make title to, but of such only as were in possession of those *tenants*. The *postea* was ordered to be delivered to the defendant.

Jeffreys *versus* Walter. B. R.

Cricket is a game within the 9 Annæ, and a bond given as a collateral security by a third person for money won at it, is void

DEBT upon a bond; the defendant craves *oyer* thereof, and sets out the *condition*, that whereas one *J. Parsons* by bond of the same date is bound to the plaintiff in the penal sum of 1000*l.* to pay him an annuity of 100*l.* *per annum* at the four usual feasts during their joint lives; now the condition of this obligation is such, that if *J. Parsons* during the joint lives of him and *Jeffreys* shall pay him the annuity, then this present obligation to be void, otherwise to remain in force; *quibus lectis et auditis*; the defendant says he ought not to be charged, because he says that after the 1*st* of *May* 1711. and before the making the said bond, *viz.* such a day and year, certain persons unknown to the defendant, who stiled themselves of the county of *Kent*, played against certain other persons who stiled themselves *all England*, at a certain game called *cricket*, and that the plaintiff won of *Parsons* 25 guineas on a *bett upon tick* upon the said game, and also won of him a second *bett* upon another game at *cricket* played between the same persons the sum of 25 guineas upon tick; and that thereupon it was agreed between the said *Parsons* and *Jeffreys*, that if the said *Jeffreys* would advance to the said *Parsons* 447*l.* 10*s.* to make up the two lost *betts* 500*l.* he the said *Parsons* would give him the said recited bond to pay him an annuity of

of 100*l.* a year during their joint lives, and the defendant avers that the present bond was given by him to the plaintiff (*as a collateral security*) for money won at play, and that it is void by the statute. Plaintiff demurs, and defendant joins in demurrer.

It was argued for the plaintiff that *cricket* is not a *game* within the meaning of the *stat. 9 Annæ*, and 2*dly*, That the present bond was not given for money won at play, whatever the bond given by *Parsons* might be.

For the defendant it was insisted, that *cricket* is a *game* though not mentioned in the statute, and comes under the general words, *or any other game or games whatever*; it is (to be sure) a manly game, and not bad in itself, but it is the ill use that is made of it by betting above 10*l.* upon it that is bad and against the law, which ought to be construed largely to prevent the great mischief of *excessive gaming*.

If *Parsons's* bond be void, there is no doubt but the defendant's bond is so too, for which was cited *Salk. 344.* a case put by *Holt C. J.* as in point. The court inclined to give judgment for the defendant that *cricket* is a *game*, and that the present bond is void; but it stood over for further argument and the parties agreed, *ut audiui.*

Price *versus* Griffith. B. R.

MR. *Philips* moved to change the *venue* from *Bristol* into *Glamorgan-shire* upon the common affidavit, and cited *Tindale v. Gwynne* in *Trinity* term last, wherein there was a rule to shew cause why the *venue* should not be changed from *London* to *Carmarthen*, which was made absolute the last day of that term upon an affidavit of service when the court was full. But now *Dennison* and *Foster* Justices (being only in court) refused to make a rule to shew cause and desired Mr. *Phillips* to stir it again when the court was full, that the matter might be fully considered, for it was of great consequence.

Quære, whether the venue can be changed by the court of B. R. into Wales.

The next day Mr. *Phillips* moved it again, when *Lee C. J. Dennison* and *Foster* were in court, and made a rule to shew cause, but declared it should not be made absolute without hearing the other side.

And now Mr. *Evans* came to shew cause, and insisted that as this court could not try it in *Wales*, the *venue* ought not to be changed, and if the court should think fit to change the *venue*, yet the

cause must be tried in an adjacent county; that the court of *Exchequer* constantly refuse to change the *venue* into *Wales*.

Mr. *Philips* *e contra*: If the *venue* be changed it may be tried *de vicineto*, viz. in the next adjacent county to *Glamorgan*, and this court cannot be ousted of *jurisdiction* into *Wales* but by plea. *Chapman v. Maddison*, *Pas.* 12 *Geo.* 2. and the defendant cannot now plead in *abatement*, the time for pleading a dilatory being now expired, and the defendant by this application admits the *jurisdiction*; this court may send the record to be tried in the next adjacent county, and if the *venue* cannot be changed into *Wales*, great inconvenience will ensue, for a poor *Welshman* may be drawn from his own country to defend himself in the most remote county in *England*.

Per curiam, The case of *Tindale v. Gwynne* passed *sub silentio*; this is a matter of great consequence, and must stand over to be considered

The venue has been frequently changed into counties palatine. 2 *Stra.* 807. *contra*.

N. B. It was said by Sir *John Strange* in the case of *Tindale v. Gwynne*, that the *Exchequer* frequently change the *venue* into *Wales*, and that in *Markbam v. Norton* this court changed it from *Cumberland* into *Lancashire*, *Pas.* 8 *Ge.* 2. and in *Gowman v. Falkner*, 9 *Geo.* 2. this court changed it from *Middlesex* to *Cheshire*; and in 2 *Ld. Raym.* 1418. it was changed into *Cheshire*, for this court can send down the record by *mittimus* to be tried in the next adjacent county; but Sir *John* admitted that in *Moore v. Fernyboagh* this court refused to change the *venue* from *London* to *Carmarthen*.

Rex versus Ellers. B. R.

A person indicted for insulting a justice of peace shall not be discharged from the prosecution altho' the justice be dead.

THE defendant was indicted for insulting Mr. *Burdus* a justice of peace in the execution of his office. Mr. Recorder of *London* moved that the defendant's recognizance might be discharged upon an affidavit that Mr. *Burdus* was dead, and that the defendant has been in gaol ever since *October* last. Mr. *Attorney General* opposed this; *per curiam*, This is a matter well becoming the government to prosecute, and the defendant must either plead Not guilty, or confess the indictment; so he pleaded Guilty, and submitted to the judgment of the court.

Waters *versus* Bovell. B. R.

TRESPASS; the defendant justifies for toll at *Hounslow*, and pleaded two pleas in *Hilary* term last; and in this term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea. Upon shewing cause Mr. *Ford* objected to adding the third plea, because it was now *two* terms since the defendant pleaded; and compared it to the course of the court not to give a plaintiff leave to add a count after *two* terms. But *per curiam*, (*absente Wright J.*) The rule must be absolute upon paying costs, both as to amending the two pleas, and adding a third; for there is no time limited for application to the court to plead several pleas; the reason why a plaintiff must apply for leave to add a count within *two* terms, is because he is obliged to declare within *two* terms, otherwise he will be out of court and a new count is considered as a declaration; and the plaintiff's being refused after *two* terms to add a count, is not under such difficulty as the defendant would be if he were refused to add a plea after *two* terms, because the plaintiff may have a new action. Serjeant *Draper* for the defendant.

Leave given to add a plea after two terms since the first pleas were pleaded

Lord Brooke *versus* Stone. B. R.

DEBT upon a bail-bond; the defendant the bail * has pleaded that the bail bond was really executed after the return of the writ, whereby the principal defendant was arrested, and that the bond is dated before the day it was executed, and is void by the statute. The plaintiff demurred, and defendant joined.

To a bail-bond, the defendant pleads it was taken after the return of the writ against the principal. Demurrer.

* In the bond to the sheriff.

A side-bar rule for the sheriff to return the writ against the principal defendant having been obtained upon a supposal that the bond is bad; it was now moved that the side-bar rule might be discharged, because the plaintiff has had an assignment of the bail-bond.

The plaintiff shall not have a rule for the sheriff to return the writ against the principal. Demurrer.

turn the writ against the principal defendant before it be determined whether the bond be

But if the bond be bad he may rule the Sheriff.

Per curiam, If a plaintiff accepts an assignment of a bail-bond, he cannot have a rule for the sheriff to return the writ; at present it remains to be determined whether the bond taken be good or not, and for any thing that yet appears to us the bond may be good, and if it be so, the plaintiff's taking an assignment thereof amounts to a return of the writ, and therefore you come too soon to move to discharge the side-bar rule; so let it be enlarged until it be determined whether the bail-bond be good.

If a plaintiff accepts an assignment of a bail-bond, he cannot call upon the sheriff to return the writ.

N. The defendant in his plea avers that the writ was returnable the 23^d of June, and that the bond was taken and executed afterwards, and traverses that it was taken before the return of the writ.

Pawlet *versus* Pawlet. In Chancery.

A father having a power to appoint portions to younger children, to be raised at all events, in such shares as he shall think fit, cannot annex a condition to the appointment of any child's share.

LORD Pawlet having a power under his marriage-settlement of distributing 30000*l.* which was settled for his younger children's fortunes, in such shares and proportions as he should think fit, appointed 29900*l.* to his son *Ann Pawlet*, subject to the devises in his will, and directed the other 100*l.* to be equally divided amongst his younger children.

Per Lord Hardwicke: This is void as an appointment, because where a father has only a power of appointing or distributing portions, which are to be raised in all events, in such shares and proportions as he shall think fit, he cannot annex any condition to the payment of any share which he appoints; and if such condition annexed is for the father's own benefit, it will then have the appearance of fraud, therefore this court will look upon such appointment to be void; otherwise it is where the portions are not to be raised at all without the father's appointment, for there the father may annex a condition. Where the appointment to a particular child is evasive and illusory, this court will set it aside, and will not allow such inequalities to be made amongst children, as appear to be unconscionable and unreasonable. However in the present case the parties in this cause having agreed to abide by Lord Pawlet's intention and will so far as could be collected; the decree was made accordingly.

Dunstan and his Wife *versus* Burwell & al'. B. R.

Joinder in action. Wherever the suit will survive to the wife she must be joined.

DEBT for a penalty in articles of agreement made between the plaintiffs and defendants, whereby the defendants agree, under a certain penalty, to grind all their corn and grain at the mill of the plaintiffs, and this penalty is agreed to be paid by the party offending to the parties offended or injured. Upon a demurrer to the declaration, Serjeant *Bootle* objected for the defendants, that the wife of the plaintiff ought not to join in this action.

But on the other side it was said by Mr. *Ford*, that it is stated in the declaration that the mill is the mill of the husband and wife, and that the action would survive to her, and the agreement is expressly with them both; and that it is a general rule that in every case where the action will survive to the wife she must be joined, and both

4 Bred. 514

1st Ad. 65

both the plaintiffs are injured; and of that opinion was the whole court, and gave judgment for the plaintiffs.

Doe *versus* Carleton. B. R.

IN *ejectment* a special case made at *Nisi prius* for the opinion of the court.

Richard Lee being seised in fee of the lands in question, and having only one child *Henry* his son and heir unmarried, in 1700. made his will, and devised his lands in these words, *viz*, " I give devise " and bequeath unto *Jane* my now wife, the right of all my messuages and tenements, both lands and leases not made unto her " in jointure, to be by her received and enjoyed immediately after " my decease for the term of three years, provided she continue so " long sole and unmarried, and not otherwise. *It em*, I give, devise " and bequeath, after the determination of the said three years, all " that tenement called *A.* (which are the lands in question) to *Henry* my son during the term of fourscore and nineteen years, if he " happen so long to live, and from and after the determination of " that term, for and during one other term of fourscore and nineteen years, if such woman as shall be his wife shall happen so " long to live, and after the said two terms, or the death of *Henry* " and such woman as shall be his wife at the time of his death, then " to the heirs of his body lawfully begotten, and the heirs of their " several bodies issuing; and for default of such issue, to the said " *Jane* my wife during the term of her natural life, and after her " decease to *E. Lee*, son of *E. Lee* my brother, and his heirs for " ever."

Testator devises to his wife for three years, remainder to his only son for 99 years if he so long live, remainder to him for other 99 years if such wife as he shall marry so long live, remainder to the heirs of his son's body and their heirs of their bodies, remainder over in fee, the devise to the heirs of the son's body is a good executory devise.

Soon after the making his will the testator died seised, leaving *Jane* his wife and *Henry* his only son and heir; whereupon *Jane* entred into the premises, (being no part of her jointure) and received the rents for three years; then *Henry* the son entred and was seised, and afterwards married *Mary Watson*, and continued in possession till the year 1718. when he died, leaving *Mary* his wife, (who was possessed of the premises and died in 1721.) and two daughters by her, *viz*. *Elizabeth* the wife of *John Salter*, and *Mary Lee*, who are the plaintiff's lessors, and no other issue, who were both infants at the time of their mother's death, and within ten years after they came of age brought this *ejectment*; and the question is, whether the lessors of the plaintiff have a title under this will as heirs of the body of *Henry Lee*; which was twice argued at the bar, by Serjeant *Belfield* and Mr. *Ford* for the plaintiff, and Mr. *Henley* and Mr. *Gould* for the defendant.

It was objected for the defendant that the devise to the heirs of the body of *Henry Lee* was void, and that if it can take effect it must be by one of these three ways; 1st, Either as a present devise; or 2^{dly}, as a contingent remainder; or 3^{dly}, As an executory devise.

1st, That it cannot take place as a present devise, because *Henry Lee* was not married at the time of the testator's death, and therefore there was no body to take; 2^{dly}, It cannot take effect as a contingent remainder, because there is no freehold to support it; and 3^{dly}, It cannot take effect as an executory devise, of which there are only three kinds; 1st, Where the devisor departs with his whole fee-simple, but upon some contingency qualifies that disposition, and limits a fee on that contingency; the 2^d sort is when the devisor gives a future estate to arise upon a contingency, but does not depart with the fee at present, but suffers it to descend to his heir; the 3^d sort are of leasehold interests or terms for years; and the present devise is none of these three sorts.

For the plaintiff it was admitted not to be a present devise, nor a contingent remainder, because there was no freehold to support it; but it was strongly insisted that the testator's intention was clearly to provide for his son and his issue, and if his intention can possibly take place by law it shall, and there is no way for it to take effect but by way of *executory devise*.

And now *Lee* Ch. Justice delivered the opinion of the whole court, that it was an *executory devise*, being to take place *in futuro*, and within the compass of lives in being; and the *possea* was delivered to the plaintiff.

Watson *versus* Richardson. B. R.

Pledges.

ACTION by bill; special demurrer shews for cause that there are no pledges to prosecute. *Ford* for defendant cited *Bro. tit. Bill*, p. 15. *Pledges* p. 11. *Dyer* 288. pl. 53. and many other cases. *Draper* Serjeant for the plaintiff: *Pledges* may be found at any time pending the suit; *Curia*, Will you move to amend and add pledges? Adjourned, and gave leave to move to amend.

Michaelmas

Michaelmas Term

22 Geo. 2. 1748.

Reech and Green, Executors of William Kenningale of Hitcham, *versus* John Kenningale, Executor of William Kenningale of Elmsfet. In Chancery.

WILLIAM Kenningale of Elmsfet having two nephews, the defendant John Kenningale and William Kenningale of Elmsfet, in 1734. made his will and John K. his sole executor, and committed to him the custody thereof. Eight years afterward on the 8th of November 1742. the testator being sick and weak, sent for the minister of the parish to pray with him, who, among other discourse he had with the testator, asked him if he had settled his worldly affairs, who answered he had not, but that he would send for his nephew John K. who had his will, to come to him the next day, and also desired the minister to come to him at the same time to assist him in making some alteration in his will in favour of his nephew William, to whom he recollected he had left nothing. Accordingly the next day the minister and the two nephews met all together in the room where the testator was lying ill in bed; after they had been together some time, the minister said, "If there is any thing for me to do it is time to go about it, for I am obliged to be gone elsewhere"; whereupon the nephew John K. produced the will, which was not sealed up in any cover, but open, and the testator desired the minister to read it over, who did so in the presence and hearing of the testator and his two nephews, whereupon his nephew William in a modest manner said, "Uncle you promised to give me 100*l.*" the testator answered, "yes, I did", and turning his face towards his executor John, desired him to pay William K. the 100*l.* whereupon John promised the testator that he would pay William the 100*l.* and told the testator that he need not make any alteration, or insert it in his will, for if William doubted his performance of the promise he would then give him his bond or note to pay it him, upon which the testator and William were satisfied, and no alteration was made in the will.

Testator being about to alter his will and leave his nephew 100*l.* his executor being present tells him he need not alter his will, for that he will pay his nephew the 100*l.* which after the testator's death he refuses to do, this is a fraud upon the testator.

The next day the testator died, and sometime afterwards *William* the nephew also died, and having made his will and the plaintiffs his executors they have brought this bill against *John K.* to be paid this 100 *l.* setting forth the matter above stated.

The defendant put in several shuffling answers, but upon the whole he admitted he had the custody of the will, and that the parties all met at old *William's* house, and the minister read the will as in the bill; but says, that when the nephew *William* said, "Uncle " you have given me nothing," the testator made no answer, but after *William* had repeated those words several times, the testator at length said to the defendant, "You may give *William* 100 *l.*" to which the defendant answered, "he would do every thing that was " just and right according to his will, and that Mr. *Haynes* (who " was the minister then present) should know it." Then he goes on in his answer, and denies that the testator desired him to give *William* 100 *l.* but believes he might say, "He would pay him 100 *l.* " or give his note or bond for it, but that he only made this offer " to prevent *William* from importuning the testator, who was very " sick and weak." Then he goes on in the same answer, and denies that he promised to pay *William* the 100 *l.* or to give him his note or bond for it, and cannot say what words the testator used upon the said occasion of meeting, and is doubtful whether he was of sound mind; that the testator did not send him orders to bring the will, but desired him to bring it the next time he came to him; that he was generally at the testator's house every day when business did not hinder him, that he cannot form any belief as to the testator's intent to alter his will in favour of *William*, and admits he refuses to pay the 100 *l.* as it is not inserted in the written will.

The plaintiffs proved the charge in the bill by Mr. *Haynes* the minister; the *apothecary* who attended him, proved the testator a day or two before his death declared he had not settled his worldly affairs, and another witness proved that about three months after the testator's death the defendant acknowledged to one Mr. *Stearn* that the testator had left *William* 100 *l.* but that he should not be in a hurry to pay it him till the year and day was up; upon which Mr. *Stearn* asked the defendant if he would then pay it, to which he answered that upon his honour he would pay it then.

Lord Chancellor: This is a plain fraud upon the testator, and the plaintiffs might almost have heard the cause upon bill and answer, for although the defendant has shuffled in such a manner, yet he has in effect admitted the substance of the bill, and I would go as far as possible to fix the defendant personally; and if the promise or declaration after the testator's death had been made to *William* the nephew instead of Mr. *Stearn*, I would have decreed the defendant

fendant to have paid the 100*l.* out of his own assets, but I think that would be going a little too far as this case is; and if there be not sufficient assets, I cannot let the plaintiffs *in, pari passu* with the other legatees, for that would be to alter the written will; but I decree the defendant the costs of the cause until this time, and that an account be taken of the testator's personal estate, and the plaintiffs to be paid out of the residue, and reserve the consideration of subsequent costs.

Baldwin and Alder *versus* Rochford. In Chancery.

THE plaintiffs were sailors on board the *Prince Frederic* privateer, which took a great prize called the *Marquis D'Antin*, the cargo whereof was chiefly gold, and carried her into Kinsale in Ireland; while they were in that harbour the two plaintiffs got on shore, and having there run into debt, sent to their captain to desire he would advance them ten pounds in part of their shares of the prize money, which he refused to do, and threatened to prick them as run away from the ship.

Contract with two sailors for the sale of their prize money set aside on the foot of imposition and public inconvenience.

The defendant knowing this and the circumstances they were in offered to buy their shares of the prize, at the same time representing to them the danger they were in of losing them, either in case they were prick'd by the captain as run away, or if the prize should happen to be retaken before she got to England, telling them the *Brest* fleet was out, &c. Whereupon and in consideration of 150*l.* paid to Baldwin, and of 130*l.* to Alder, they assigned their respective shares of the prize, and of what they might afterwards become intitled to, to the defendant; and it coming out that the plaintiffs shares amounted to about 600*l.* a-piece, and that the defendant knew this, the plaintiffs have therefore brought their bill to be relieved against this bargain, upon the foot of *imposition* and public inconvenience, in case such bargains be suffered to stand, and set forth the matter as above, which was proved.

For the defendant it was insisted that he ran a great risk, for that possibly the shares might be less than what he had really given for them, and that before the prize could be got safely into some English port, there was both the danger of the seas and of the enemy, and if she was lost or retaken he would lose all his money.

Lord Chancellor: The general head of equity which the bill goes upon is *fraud* and *imposition*; and 1st, Here is a *presumption* of *fraud* arising from the circumstances appearing in the cause, and the great value of the thing sold in proportion to the small price paid for it; and although it is generally laid down both at law and in

PART I.

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this court that *fraud* shall never be *presumed*, yet an *evidence of fraud* may arise from the circumstances and nature of the contract.

2dly, Here is *actual fraud* proved, and appearing upon the face of the bargain.

And 1st, Here is an *evidence of fraud* appearing upon the circumstances of the contract, from the inequality of the price to the value of the thing sold. If the plaintiff *Baldwin* was a quarter-master (as it seems he was) it is admitted his share will be about 900*l*. if he was only a common man 600*l* and the other plaintiff's share is about 400*l*. So that one plaintiff has sold his share for about a fourth, and the other for little more than a fourth of the value. In the cases of *marriage brokerage bonds*, *contracts with young heirs*, &c. this court constantly sets aside such bargains, upon the principles of public policy, and because of the great inconveniences such contracts would be to the public if they were suffered to be valid.

There cannot be a more useful set of men to the public, nor a more unthinking sort of people than *common sailors*, who as soon as ever they get on shore, for the sake of a little immediate pleasure are willing to part with their right to any thing in *expectation*, for a very little in *possession*; and this is the sense of the legislature, both from the *stat. 1 Geo. 2.* and the *20 Geo. 2. c. 24.* whereby they have taken notice of them as a set of men not fit to take care of themselves, and therefore have taken care of them against themselves. I do not say that every *contract* with a sailor is void, or ought to be set aside, but every *contract* with them must be *fair*. A *sailor* shall not be held to bail for less than 20*l*. and therefore no body will lend one of them 20 shillings unless he gives his note for 20*l*. which none of them ever refuse, and do it every day in *Wapping*, which shews what I have before said to be true, that they will do any thing for a little ready money to enable them to take their pleasure.

Morrough v.
Comyns, ante.

It has lately been determined that assignments of this kind are good at law, and give the assignee a legal demand against the agent for the ship for money received for the assignees use, though a court of equity might relieve in some cases; but this I think was going a great way, and the *stat. 20 Geo. 2.* was made to prevent the expence of suits in equity.

As to the inequality of the price paid, it is said for the defendant that can be no reason to set aside the contract, considering the risque he ran of losing his money; and although by the *Roman law* the contract was void when the *price paid* was not *half the value* of the thing sold, yet *that law* was never established in *England*, nor does our law fix any certain proportion that the price shall bear to the thing.

In answer to this, I think *that* alone without any other matter appearing in the case would not be a reason to set aside the contract in this case, but taking all the circumstances together, (*and junctis junctis*) that it appears the defendant had made inquiry into the value of the shares, and applied for that purpose to the captain, had told the plaintiffs they were in danger of being *prick'd* run away, and alarmed them with the danger of enemies and the sea, shews plainly there was *imposition*; so it appears the defendant most probably knew the value of the shares better than the plaintiffs, for though one of them was a quarter-master, yet it doth not follow from thence that he knew the value, for the head officers endeavour to keep *that* a secret as much as possible from every body in the ship, for reasons obvious to any one. As to any hazard the defendant might run that is nothing, because it appears the shares were insured at 4*l.* per cent. from *Kinsale* to *London*.

2dly, The *assignment* itself is pretty extraordinary; it is, All and "singular such shares of pay, wages, bounty money, prize money, "plunder money, and all monies as now are or hereafter shall be "payable to me out of the *Prince Frederic and Duke privateers*:" Now the plunder money is a distinct thing, and might take in what these persons might be intitled to by going in these privateers at any time afterwards; this shews a bad intention in the defendant, and that plaintiffs did not mind what they were doing, and that the defendant was very sharp, and is some evidence of *actual fraud*.

Upon the whole the plaintiffs must be relieved; and therefore I order the *assignment* to be set aside, but not so absolutely, but that it shall stand as a security for what is due to the defendant *Rochford*, and that he shall only have his principal money with interest at 5*l.* per cent. and that the managers of the prize shall pay the plaintiffs the rest of their shares, that *Rochford* shall pay plaintiffs their costs as between them and him till this time, and that the plaintiffs shall pay the managers their costs to this time.

Van Morfell *versus* Julian. E. R.

THE plaintiff being a merchant at *Amsterdam*, and the defendant residing at *London*, indebted to him in a large sum of money; the plaintiff made oath of his debt before a *Burgo-master* in *Holland*, who certified an account thereof to the plaintiff's agent here who makes an affidavit that he believes the said oath and account current are true, and thereupon sues out a writ and holds the defendant to special bail; and now Mr. *Evans* moved that common bail might be accepted, insisting that this is not a *positive affidavit* of the plaintiff's *cause of action*, which the *stat. 12 Geo 1.* requires for this

There must be a positive affidavit of the cause of action to hold defendant to special bail.

2 Stra. 1157, 1209, 1219, 1226.

this purpose. Mr. Ford for the plaintiff cited *Loveland v. Bassett*, Trin. 16 Geo. 2. where an assignee of a bond swore that the obligor was indebted in 90*l.* for principal and interest upon the bond, *as he believed*; and it was held sufficient to hold the defendant to special bail.

Per curiam, A positive affidavit of the cause of action is always required, and affidavits going only to belief have often been held insufficient; and in the case cited by Mr. Ford there was something more than in the present case, for the assignee had the bond in his own custody, which of itself was some evidence of the debt, and the presumption must be that it was not paid as the bond was not cancelled or given up to the obligor. So the rule for common bail was made absolute.

2 Q B 169

1 Mr M. 582.

1. Imp Caru Kemp. Geo. 2, 245

Reynolds versus Kennedy. B. R.

~ fuller note

1 B R 128

1 B R 128

If the condemnation of goods for not entering and paying duty, by sub-commissioners be reversed by the commissioners of appeal in Ireland, in an action for a malicious prosecution does not lie against the informer, for the judgment of the sub-commissioners shews there was a foundation for the information and prosecution.

ACCTION upon the case for a malicious prosecution brought in the King's Bench in Ireland; the declaration sets forth that the defendant upon such a day and year, with an intent to injure and oppress the plaintiff, at such a place, in the hold of a certain ship called the *unity*, the property of the plaintiff, and under the hatches of the said ship, unjustly seized and detained sixty-one hogsheds of brandy, the property of the plaintiff, and removed it into the King's storehouse; that the defendant exhibited an *information* against the plaintiff before the *sub-commissioners of excise* to oppress the plaintiff falsely and maliciously, alledging that the said sixty-one hogsheds of brandy were brought into *Cork* in the said ship, and were intended to be carried away again without due entry first made or payment of the duty; that the *sub-commissioners* condemned the brandy, but upon an *appeal* to the *commissioners of appeal* they most justly reversed the judgment of the *sub-commissioners*, and ordered the brandy to be restored to the plaintiff, whereby the plaintiff has been put to great costs and damages, and therefore brought this action; the defendant pleaded Not guilty, and the jury upon the trial gave a verdict for the plaintiff, and 37*l.* 17*s.* 10*d.* damages. But the court of *King's Bench in Ireland* have given judgment that the plaintiff shall take nothing by his bill, and that the defendant may go without day; that is to say, they have arrested the judgment. The plaintiff has brought a writ of error, and the error assigned is that the *King's Bench in Ireland* ought to have given judgment for the plaintiff upon the verdict.

This case was twice argued at the bar; and this term the Chief Justice delivered the opinion of the whole court.

Lee:

Lee Ch. Justice: I shall first premise that although an action will lie against one for proceeding *wrongfully* in an *inferior court* in many cases, yet it is a kind of action not to be favoured; and whenever such action is brought, the *express malice* and *grievance must be laid* in the declaration *and proved*; and it is not enough to say that the defendant brought an action against the plaintiff *ex malitia & sine causa, per quod* he put the plaintiff to great charges. 1 Salk. 14, 15. 1 Lord Ray. 380, 381. Hob. 266. 1 Ro. Abr. 112. p. 8. I shall consider the declaration in two views: 1st, The plaintiff having laid in his declaration that the *sub-commissioners* condemned the goods, shews a foundation for the defendant's prosecution before them; so that this part of the declaration is plainly *felo de se*. Hob. 226. 6 Mod. 262. Hard. 195. And 2^{dly}, Although it is laid that the *commissioners of appeal* most justly reserved the judgment of condemnation of the *sub-commissioners*, yet we are all of opinion the plaintiff is not intitled to this action for we cannot infer from the judgment of reversal of the *commissioners of appeal* that the defendant the prosecutor was guilty of any *malice*, and the judgment of the *sub-commissioners* has justified the proceeding before *them*; if an action upon a *false surmise* be brought against me in a *proper court*, I cannot have an action against him that brought it, and charge him with it as a *fault directly*, as if the suit itself was a wrong act, for *executio juris non habet injuriam*. Hob. 266. and the *gist* of these sort of actions arises from some *evil practice* or *malice* in him who sues or prosecutes. Lutw. 1571. Upon the whole we think the plaintiff himself has shewn by his declaration that the prosecution was *not malicious*, because the *sub-commissioners* gave judgment for the defendant, and therefore we cannot infer any malice in him.

Judgment of the King's Bench in Ireland affirmed.

Bodwic *versus* Fennell. In Error. B. R.

ACTION of debt for 4*l.* brought upon a *by-law* in the borough court of the *devizes*; the declaration sets out that there has been a custom time out of mind in that borough that no person whatever, unless admitted of one of the guilds or fraternities *there*, has a right to keep a shop in the town, (unless in the time of an open fair) nor to follow any mystery, handicraft or trade in the town, and that a *by-law* has been made for the better preserving and supporting the said custom, which gives a penalty of 4*l.* to any person who will sue for the same; and sets forth that the defendant (below) not being admitted of any of the guilds or fraternities, and being a stranger to the corporation, had kept a shop and exercised the trade of a shoemaker, *per quod actio accrevit* to the plaintiff to have and demand the said 4*l.* The defendant below demurred, and

A custom to exclude foreigners in a corporation and a by-law made to support it are good, but the penalty given by the by-law cannot be to a stranger.

PART I.

0 0 0

judgment

judgment *there* was given for the plaintiff, and a Writ of error is brought and the general errors assigned. This case was argued last Michaelmas term.

Mr. Evans for the plaintiff in error took several exceptions :

1st, The custom is unreasonable, because, for any thing that appears, a person who has duly served an apprenticeship in the *Devizes* may not be allowed to follow his trade, for it does not appear upon what terms a man is to be admitted of any guild or fraternity; and the terms may be very arbitrary, therefore it ought to have been laid in the custom to make it a good one, that every person may be admitted upon reasonable terms, as serving an apprenticeship, &c.

2dly, The court where this action is brought is holden before the mayor, recorder and burgeses of the *Devizes*; the action is in nature of a popular action brought by a stranger, but yet it must be considered for the benefit of the corporation, so that both the judges and jury, are to judge in their own cause, for the breach assigned is upon the custom and not upon the by-law, but the by-law is only brought in, to fix the damage, which shews the action is principally founded on the custom, which is for the benefit of the corporation, who are the judges.

3dly, There is not a sufficient breach assigned, for it is not laid that when this shop was kept open that it was not upon a fair-day, for any man may keep a shop on a fair-day.

4thly, What I principally rely upon is, that supposing the case to be laid properly, and the court below has jurisdiction, yet this plaintiff being a stranger cannot recover for the breach of the custom, nor can the corporation, legally, make a by-law to annex the remedy to a person who has not the right, that is to say, give an action for the penalty to a mere stranger.

Mr. Henley for the defendant in error : In answer to the exceptions, 1st, It was never doubted but a corporation may, by custom, put such terms upon the inhabitants as are agreeable to, and consistent with the custom; and no man can be free of the city of London unless he be first admitted of some Guild, and if it appears that the terms of admission or fine for it be unreasonable, this court upon a mandamus will judge thereof, therefore the corporation cannot put arbitrary terms of admission upon any man.

5 Mod. 104. 2dly, The corporation is not at all interested in the recovery of the penalty, for the plaintiff *here* recovers for himself.

3dly,

3dly, The breach assigned is, that he kept a shop within the *Devizes*, and exercised the trade of a shoemaker therein *contrary to the custom*, which shews that it was not upon a *fair-day* only, for that would not have been *contrary to the custom*.

4thly, A custom to exclude foreigners is good, and they may make *by-laws* to enforce and support that custom, (though I admit a grant from the crown of such a privilege would be bad) and therefore the *by-law* is set out to shew it does not exceed the custom.

Lee Ch. Justice: Did you ever know a penalty upon a *by-law* given to a stranger?

Dennison Justice: If a corporation have a custom and any thing be done in breach thereof, the corporation itself must bring the action, and there is no instance of any such action by a stranger, but only in that of the Chamberlain of the city of London, 5 Rep. 63. It has been determined in the case of *Ellington v. Cheney*, 9 Geo. 2. that a custom to exclude foreigners is good, and that a *by-law* with a reasonable penalty in support of such custom is good, when the penalty is given to the corporation or guild; this was error from the Mayor's Court of Bath in an action brought by the Master of the guild of Shoemakers of Bath, wherein the plaintiff declared that it was a corporation by prescription, that there had been a guild of shoemakers immemorially, and that none should exercise the trade who was not made free thereof; and a *by-law* was made, that if any person should follow that trade not being free, he should forfeit a certain penalty, to be recovered by the master of the guild, who brought the action, and the judgment was affirmed.

Then the case at bar stood over, and Mr. Evans replied three days afterwards, and cited the case of *Hollings v. Hungerford*, Pasche 3 Geo. 1. which was debt upon a *by-law* for recovery of a penalty upon a *by-law* by the chamberlain of Bristol; the *by-law* was made under a power they had by their charter, which power was to make *by-laws*, with penalties to be recovered for the use of the corporation; the *by-law* in this case was, that every man who should be chosen a common council man, if he did not appear within such a time and take the office upon him, should forfeit 200l. the defendant did not attend and take the office upon him, so the action for the penalty was brought by the chamberlain. The case was argued by serjeant Branthwaite and Mr. Yorke (the present Lord Chancellor) and it was objected by the Serjeant that the Chamberlain was a stranger to the corporation, that he was a stranger to the right, and therefore was a stranger to the remedy, for that the right was in the corporation; but Lord Parker Ch. Justice and the court held, that the action was well brought, and that *camerarius ex vi termini* signifies thesau-
Hollings v.
Hungerford.

thesaurarius of the corporation; and they declared that he recovered for the benefit of the corporation; and this court will take notice of the relation there is between the *chamberlain* and the corporation, and that he is no *stranger*, but (as it were) part of the corporation; from hence Mr. *Evans* concluded that a stranger cannot bring this kind of action.

Henley: There is no negative determination in the case last cited that they could not have given the penalty to a *stranger*.

Lee Chief Justice: I think none of the *three first objections* will hold, and am only doubtful upon the *last*.

I do not find any instance of an action upon a *by-law* made for the recovery of a penalty in the manner (given to a *stranger*) as this is; for *this* is much the same as if it had been given to be recovered by a *common informer*. In the case of *Hollings v. Hungerford*, the force of the objection was, that the action was brought by a *stranger*; the answer given to it, and upon which the court gave judgment, was, that the *chamberlain of Bristol* was not a *stranger*, but a known officer of the corporation, their servant and appointee to sue for such penalties as the corporation was intitled to recover.

There is a *right* in the corporation in respect to the *custom* itself to have the *custom* adhered to, and they are intitled to damages for breach thereof; when they have made a *by-law* with a penalty for the breach thereof, they have thereby fixed the damages, which they may lawfully do; but I do not know that by any rule of law they can transfer their *right of action* to a *stranger*; I do not mean to bind myself by what I have now said, but this is what I think, as at present advised.

Wright Justice: The only difficulty with me is that the penalty is given to a *stranger*. In the case of *Player v. Archer*, 2 Sid. 105. it appears a *by-law* was made whereby a moiety of the penalty was given to a *stranger*; if they could do that, why may they not give away the whole to a *stranger*? the *chamberlain of London* is as much a *stranger* to the *right*, as any other person, and where is the unreasonableness of giving the penalty to a *stranger*? in public laws it is very common, and almost always done, this is a point of great consequence, and therefore requires further consideration.

Dennison Justice: I think this *custom* to exclude *foreigners* is good, but that the *by-law* is a bad one.

The *corporations* where these *customs* are, have originally a *right of action* in themselves for the breach thereof; this was formerly a doubt, but has of late years been solemnly determined in *C. B. 6 Mod. 21. Mich. 5 Geo. 2.* between the *corporation of Colchester* and *Sympson*, which was an action upon the case against the defendant for exercising a trade not being a freeman, contrary to the *custom*, to the damage of the plaintiff; there is now no doubt but such an action will lie, and a *corporation* need not make any *by-law* to enforce the *custom*, because the law gives them an action originally. They may, indeed, if they please, make a *by-law* and fix a penalty for the breach thereof, but it must be a penalty to the *corporation* itself, and pecuniary, and may be levied by *distress*, or recovered by an *action of debt* at the suit of the *corporation*; I am not for carrying the *right* to sue, further than the *chamberlain* of a *corporation*, as in *Hollings v. Hungerford*. The case at bar goes further than carrying it to a *stranger*, for it gives the action to *any person whatsoever* let him live where he will, which is extremely inconvenient, for if the plaintiff should be nonsuited where must the defendant find him; and as there is no precedent for such a *by-law* as this is, I am of opinion it is bad, as at present advised.

Foster Justice: These exclusive privileges are much abused; I have no objection to the *custom*, nor to the assignment of the breach thereof, but think the *last objection* requires consideration; in the case of *Hollings v. Hungerford*, the *objection* was founded upon this principle, that the action could not be maintained by a *stranger*; but the answer to it was, that the *chamberlain* was not a *stranger*, but sued for the *corporation's* benefit, and the court seemed to admit the strength of the *objection* that the action could not be maintained in the name of a *stranger*. And in the case of *Ellington v. Cheney*, 9 Geo. 2. the *Cb. justice* said that an action upon a *by-law* in the name of a *stranger* would not lie; if such a *by-law* as this were to be held good, it would be letting loose all mankind, and a poor man might have 500 actions against him at once, and not know where to find one plaintiff.

This case having stood over for a whole year, the *Cb. Justice* this term gave judgment, and said, that although a *body politic* has power to make a *by-law* to enforce a penalty for breach of a *custom*, yet they cannot give an action (to recover that penalty) to a *stranger*, but the *corporation* themselves, or somebody for them (as the *chamberlain* in the case of the city of *London*) must sue for the same; if the law were otherwise it would be very inconvenient, it would be like assigning a *chose en action*, which the policy of the law will not endure. *Co. Lit. 214. a.* And for this reason the judgment below *per totam curiam* was reversed.

Collet *versus* Masterman administrator. B. R.

Issue, whether
material or
not.

DEBT upon a bond; the defendant pleaded *plene administravit*, the plaintiff replied that the defendant had assets sufficient in his hands to satisfy the *damages* aforesaid and thereupon issue was joined; and the jury found a verdict for the plaintiff that the defendant had 300*l.* assets in his hands not administered.

Mr. *Whitaker*, moved in arrest of judgment that this is an immaterial *issue*, for it ought to have been whether the defendant had sufficient to satisfy the *debt and damages*.

Mr. *Ford e contra*: The word *damages* is only *surplusage*, and by leaving it out the *issue* will be a sensible material *issue*, viz. whether the defendant had *sufficient to satisfy*, &c. and of that opinion was the *whole court*. Judgment for the plaintiff.

Bagshaw *versus* Spencer. In Chancery.

A court of equity will direct a conveyance agreeable to the testator's intention, and depart from the words of a will in case of a trust executory.
Eq. Ca. Abr. 185, 186.

PER Lord *Hardwicke*: A court of equity is sometimes obliged to depart from the words of a *will* in order to direct a *conveyance* to be made which will answer the *intention* of the testator. The word *issue* in a *will* is a word of *limitation*, but in a deed is always a word of *purchase*. *Heirs of the body* in a *will* are not always words of *limitation*, but may be often taken as words of *purchase*, in order to fulfil the testator's *intention*.

There is a difference between a *trust* which by the words of a *will* is *executed*, and a *trust* which is only *executory*; as a *devise* to *A.* and his heirs, upon *trust to convey to B. and the heirs of his body*, is a *trust executory*, and this court will make *heirs of the body* words of *purchase*; but a *devise* to *A. and his heirs in trust for B. and the heirs of his body* is a *trust executed*, and *B.* will have an estate-tail; and this court has greater right to interfere in the one case than the other. As all *trusts* in notion of law were *executory* before the *statute of uses*, which has executed many of them, which are thereby become *legal estates*, and wherewith this court does not interfere, therefore in order to bring a *trust* within the *jurisdiction* of this court it must be *executory*; but where a *trust* is *executed*, the testator has left nothing for a court of equity to do.

Hilary Term

22 Geo. 2. 1748.

Rex *versus* Dr. Purnell Vice-Chancellor of Oxford.

A Rule to shew cause why the *Attorney General*, or *Solicitor*, or *Agent* on the behalf of the crown, should not have liberty to inspect the public books, records and archives of the university of Oxford, and to take copies thereof, was obtained last term, upon the motion of Mr. *Attorney General*, Sir John Strange, and Mr. *Solicitor General*; and now Mr. Wilbrabam, Mr. Henley, Mr. Ford, Mr. Evans, and Mr. Moreton, shewed cause on behalf of the defendant; and first they objected that the rule obtained was too large and general, whereupon Mr. *Attorney* narrowed it, and acquainted the court that all they wanted was to take a copy of the statutes of the university, which are kept by a proper officer called *Custos Archivorum* of the university, whereby it would appear what was the duty of the *Vice-chancellor*.

Upon an information by the *Attorney General* against the *Vice-chancellor* of Oxford for a misdemeanor in his office. the crown shall not inspect the statutes, and archives of the university

Counsel for the defendant: This is an information exhibited by the *Attorney General* *virtute officii* against the defendant for a misdemeanor and misbehaviour in the neglect of his duty both as *vice-chancellor*, and a *justice of peace* of the university; and what is now prayed on behalf of the crown is contrary to a well known maxim of law, *that no man is obliged to accuse himself*, and more especially in a criminal prosecution, as *this* is. Doctor Purnell, a single member of the university, prosecuted in a criminal matter; the like rule might as well be prayed in the case of an indictment of any other member or scholar; or if any one citizen of London was prosecuted, the like rule might as well be prayed to inspect the books, papers and archives of the city, which no young gentleman who attends this bar would be so weak as to move.

No man is bound to accuse himself.

But suppose the crown, as founder, has a right to visit the university, *that* is a reason for this court not to interpose, because there would be another plain method of proceeding.

2 Sira. 1005.
S. P.
No access to
the post-office
books in col-
lateral actions.

Nor to the
custom-house
books.

The case of *Crew v. Blackburn* was a *qui tam* against the defendant as a clerk in the *post-office* for a penalty of 50 *l.* for interfering in the election of a member to serve in parliament; a motion was made by the plaintiff for leave to inspect the books of the *post-office*, alledging that those books were touching the public revenue, in which every subject has a right and interest; but the court refused to grant the motion, and confined themselves to *this, viz* that the question in the cause not concerning any transaction in the *post-office* (for which transactions only those books are kept,) denied to grant the rule. So, also in the case of *Benson v. Port* in the last term, which was an action on a policy of insurance; the defendant applied for a rule to inspect the books of the *custom-house* (intending to controvert the plaintiff's interest) alledging that those books were of a public nature wherein every subject was interested, as he had paid duties to the crown, and entred merchandizes in those books; but because the question in the cause depending was not touching the subject matter contained in the books, the court refused to grant the rule.

The case cited by Mr. Attorney of the King *v. Berking*, 7 Geo. 1. was an indictment for following a trade not having served seven years as an apprentice, which was removed *here* by *certiorari*, and a rule was made to inspect the books and records of the court or corporation where the indictment was found; this is not at all like the case at bar, for it was nothing more than what the party had a right to, as well as every subject in the kingdom has a right to see any public record, as an indictment *is*.

No inspection
of the books
of the college
of physicians
by a doctor
who is not a
member
thereof.

5 Mod. 395,
396.

Information
against over-
seers for ma-
king an illegal
rate, the
parish books
shall not be
inspected,

These rules of inspection, in the cases of *copyholds*, *corporations*, books of the *customs*, &c are never granted but only where civil rights are depending, and by which the very thing in question depends, and must be determined. Doctor *West* was prosecuted for practising physick not being a member of the *college of physicians*, nor having a licence, nor being a graduate of either university; he moved for leave to inspect the books of the *college of physicians*, upon an imagination that he might find some entry therein in his favour; but the court refused to grant the rule, and said the doctor had no right to see the books, he not being a member of the college.

Rex v. Lee, Mich. 17 Geo. 2. was an information against *Lee* and another overseer of *Windsor* for taking upon them to make a rate without the concurrence of the *churchwardens*; a rule for the inspecting of the books and papers of the parish was made absolute *sub silentio*, and a rule for an attachment unless cause was made, for disobeying the rule; upon shewing cause against the attachment, the court said the rule to inspect the parish-books ought not to have been made, because it was obliging the defendants to produce evi-

dence

dence against themselves, and discharged the rule for an attachment; and the maxim, "*that no man shall be bound to accuse himself*" has always been so religiously adhered to, that in the case of a witness, if any question be put to him which may affect himself he shall not answer thereto, although possibly his answer might do compleat justice between the parties, so that the law will rather suffer a particular injustice, than break through this maxim, which would be so generally inconvenient. Many other cases might be cited, as 2 Lord Ray. 927. *The Queen v. Mead. Bradshaw v. Hasselwood. Same v. Phillips.*

Supposing the defendant has these statutes in his custody, he is only a trustee for the corporation, and whatever crime he may have been guilty of, *that* cannot affect the university; and if the crown is the visitor, the application must be to the Chancellor of *England*, and not to this court; and if this court was to make this rule absolute, it will (instead of doing justice) lay a foundation for some thing like an *inquisition of state*, for this court sits to *hear* evidence, not to *furnish* it.

Mr. Attorney and the counsel for the crown in reply insisted, that the public justice of the nation was concerned, that the crown gave the statutes whereby the vice-chancellor was to govern himself and be governed, that the King had a right to see them, that it might be known and seen whether he had so done.

The court took two days to consider, and then the Ch. Justice delivered the opinion of the whole court.

Lee Ch. Justice: We are all of opinion that we cannot make this rule absolute, and found that opinion upon former cases, but think *this* is a much stronger case than any of them. The only case cited for the King upon the motion for this rule was *Rex v. Berkett* or *Ferking*, which was an indictment for exercising a trade not having served an apprenticeship; application was made that the prosecutor might be named, the court could not do *that*, but said "You may have a rule to take a copy of the record, and then you will see upon the backside of the indictment who the prosecutor is"; they had certainly a right to a copy of the record below, and if refused this court would have granted a rule, but this is not to the present purpose.

The case to the present point is 2 *Ld. Ray.* 927. *The Queen v. Mead*, 2 *Anna*, where the reason given for refusing the rule was the maxim mentioned at the bar, "*That no man is bound to accuse himself*". Another strong case was in this court, *Trin.* 17 & 18 Geo. 2. *Rex v. Cornelius of Ipswich*. An information was filed

against him and another justice of peace for exacting money from persons for licensing alehouses; it was moved by the prosecutor for leave to inspect the corporation-books; a rule was made to shew cause in the usual terms to inspect the papers, books and records of the corporation; and upon shewing cause it was very strongly debated on both sides, by Sir *John Strange* and Sir *Richard Lloyd*, and all the cases cited then that have been now cited, before the rest of my brethren (myself absent), time was taken to consider, and I had a conference with my brothers, and we all agreed the rule could not be granted, because it was a criminal proceeding, and that the motion was to make the defendants furnish evidence against themselves; the present case is rather stronger, because is a prosecution for a *crime of a more public nature*, for unless it be such, this court has no jurisdiction. And this is unlike a *quo warranto*, for that is a right granted by the crown, and the public books and records are the proper evidence on both sides. Rule discharged.

Stork *versus* Herbert and Eyton. B. R.

Practice.
The title of a
declaration
amended.

A *Latitat* was sued out against the *two* defendants sued jointly, which was returnable the second return of the last term; the defendant *Eyton* only was served with a copy thereof before the return of the writ, and a declaration was delivered to him in an action against *both* the defendants as of *Michaelmas* term last; then an *alias capias* issued, wherein *both* the defendants were named, returnable the first return of the present term, which was duly served upon the other defendant *Herbert*, who filed common bail of this term, and then a declaration was also delivered to him intituled of last term, in the same action against *both* the defendants, and upon the first day of this term a rule to plead against *both* jointly was given, they having *both* filed bail before the rule was given, *viz.* *Eyton* of last term and *Herbert* of this; and now it was moved to set aside the proceedings for an irregularity in delivering a declaration to one defendant in an action against *two*, when *one* was only served with process and in court. But *per curiam*, The irregularity is only a mistake, and the plaintiff may amend his declaration by intitling it of this term: and defendants took nothing by the motion.

Goldsworthy

Goldsworthy *versus* Southcott. B. R.

THE defendant died after interlocutory judgment signed, and after a writ of inquiry executed and damages assessed, but before the return thereof, or final judgment was entered, and thereupon the plaintiff sued out a *scire facias* against the executor of the defendant, to shew cause why a new writ of inquiry of damages should not be awarded and new damages assessed and be recovered; and now Mr. Hufsey moved to quash the *scire facias*, because it did not state the situation of the cause at the instant of the defendant's death; for damages were at that time assessed, and the *scire facias* ought to have been to shew cause why the damages assessed by the jury should not be adjudged to the plaintiff, &c. and of that opinion was the court, and quashed the *scire facias*; *Dennison* Justice cited *Spencer Compton v. Leeds*, 13 Geo. 1. C. B. where the form of this kind of *scire facias* was settled on a demurrer, viz. that it must be to shew cause why the damages assessed by the jury should not be recovered, and said he heard the argument in that case.

Where a defendant dies after a writ of inquiry executed and before the return thereof, the *scire facias* against his executor must be to shew cause why the damages assessed should not be recovered.

1 Salk. 315.
Lill. Entr.
647.

note such *scire facias*.
5. Wms. Pr. 815

Parsons *versus* Lanoe. In Chancery, 28 January.

COLONEL Lanoe, an officer in the army, being about to go to Ireland, in July 1732. made his will, wherein he expresses himself thus, viz. "I make my will in manner following; " First, In case I die before I return from my present journey to Ireland, I order that my house at Farley-hill and all the furniture be sold as soon after my decease as conveniently may be, then charges the same with his debts and funerals, and gives 1000 l. to be paid out of the money arising by such sale to Theophilus B. and other legacies, and after payment of his debts and legacies, gives the residue to his wife and her heirs for ever, and makes her and Ingram and the plaintiff Parsons executors."

Testator devises that if he dies before he returns from Ireland, his estate shall be sold, &c. he does return, and dies, and this will is found in his keeping at his death, it was only a contingent devise, and shall not take effect.

Soon after the making of his will the testator went to Ireland, continued there for some time, and then returned to England; at the time of making his will and going to Ireland he had no children, after he returned he had two by his wife, a son and a daughter, and lived till 1738. when he died.

It appears in the cause that the testator kept the will by him, that he made no other will, and that it was found in his keeping at his death, and has been proved in the spiritual court; and now this bill is brought for the 1000 l. to have the real estate sold, and to have performance of a contract entered into for the sale thereof to

Mr.

Mr. *Walker*; the widow and executors, Mr. *Walker*, and the son and heir of the testator, are made parties.

Swinburne.
Condition.

Lord Chancellor: Two questions have been made, 1st, Whether this be not a contingent disposition; 2^d, Whether the testator's returning from *Ireland*, living afterwards with his wife till 1738. and having two children without ever publishing his will shall not amount to a revocation thereof, notwithstanding the evidence of his keeping it by him; and as to the first point, I am of opinion that this is a contingent disposition, and depended upon his not returning from *Ireland*; and therefore I shall give no opinion whether the great alteration in the testator's family amounts to a revocation; there is a great difference since the statute of frauds, between what would amount to a revocation of a will of lands, and of a personal estate; for as to lands, *that* statute prevents *all other ways* of revoking a will except *those* therein mentioned. Dismissed the bill without costs.

Rex *versus* Brough, Esq; Mayor of Hedon. B. R.

Information in nature of a quo warranto; defendant pleads he is a Gentleman and not an Esquire, this is bad, because this kind of proceeding is not within the statute of additions.

INFORMATION in nature of a *quo warranto* against the defendant to shew by what authority he exercised the office of mayor of the town of *Hedon* in the county of *York*; the defendant pleads that at the time of exhibiting the information he was a *Gentleman* and not an *Esquire*, *absq' hoc* that he was an *Esquire*. In last *Trinity* term Sir *Thomas Bootle* moved to set this plea aside as frivolous; and only pleaded to gain time, and to prevent the information from being tried at the next assizes, for that the defendant by his office of *mayor* appeared to be an *Esquire*; besides, informations in nature of *quo warranto's* are not within the *statute of Hen. 5. of Additions*; the court were strongly inclined to set the plea aside upon motion, and said they had no doubt but it was bad, but as it was a new case they could not set it aside upon motion, but that after it has been once determined to be bad upon a demurrer, they would from thenceforth set it aside upon motion, therefore a demurrer was afterwards put in to this plea, which came on to be argued this term.

Serjeant *Bootle pro Rege*: The plea is bad, because the statute of additions only extends to actions personal, appeals, and indictments wherein process to the outlawry lies, and not to informations in nature of *quo warranto's*, wherein there is no original writ, nor will process to the outlawry lie.

But suppose this case be within the statute of additions yet the plea is bad, for the addition of *Esquire* is as well as gentleman; the

King's

King's serjeant of the kitchen is an *Esquire*, and yet he may be sued by the addition of *Cooke, Esquire* or *Gentleman*, and all degrees below *Knight*, are names of *worship* only. *Theol. Dig.* 57. p. 6. The plea is also bad in point of *form*, for it ought to conclude *et hoc paratus est verificare*, and not with a *traverse*. *Raft.* 108.

Mr. Nares *è contra*: It having never been determined whether these kind of informations are *civil* or *criminal* suits, I am at liberty to say they may be considered as *criminal*, and if so, process to the outlawry lies. *Salk.* 371. which brings *this* within the statute of additions. I admit a man may be an *Esquire* by his office, but no part of our plea admits the defendant to be *mayor*; there is certainly a difference between an *Esquire* and a *Gentleman*, inasmuch that in the court of C. B. Hil. 14 Geo. 2. between *Messer v. Molyneux*, in a motion for a *procedendo*, an affidavit was produced, wherein a person named therein *gentleman* appearing to be a *barrister*, the court would not permit the affidavit to be read, because a *Barrister* is an *Esquire* by his office or profession.

As to the objection to the *traverse*, that is only surplusage, and there are many cases where a *denial* and *traverse* are the same thing, *Lambert v. Strowther*, Hil. 14 Geo. 2. C. B. the defendant pleaded *liberum tenementum*; the plaintiff replied it was *his freehold* and not the freehold of the defendant, and this was held good without a *traverse*.

Lee Ch. Justice: There never was any process to the outlawry upon an information in nature of a *quo warranto*, which is not like a *quo warranto* by original writ, which was in use before this manner of proceeding; the *stat. of Additions* is to be taken strictly, 2 *Inst.* 670. and only extends to cases where process of outlawry lies. *Cro. Eliz.* 148. Lord *Dacres's* case; I shall say nothing as to the manner of pleading, because I am of opinion this case is not within the statute of additions. Judgment by the whole court, that the defendant *respondeat ouster*.

Wightman *versus* Thompson.

MOTION to change the *venue* upon the common affidavit, after an order of a judge for time to plead upon pleading *is-suably* and taking a short notice of trial for the sitting within term in *Middlesex*, the court changed the *venue*.

Venue changed after judge's order to take notice of trial in Middlesex.

Easter Term

22 Geo. 2. 1749.

Tomlin spinster by her guardian *versus* Brookes.

Infant by
guardian sues,
the plaintiff's
attorney must
give notice of
the guardian's
place of
abode.

ACTION upon the case upon a promise of marriage; Mr. *Weller* moved on the behalf of the defendant that the plaintiff's attorney might be obliged to give notice to the defendant's attorney of the place of the guardian's abode, upon an affidavit that the defendant did not know where the guardian lived, but had heard he was a man of mean circumstances. *Per curiam*, This was granted, and is often done in the cases of *qui tams* and infants.

Trinity

Trinity Term

22 & 23 Geo. 2. 1749.

Dore *versus* Geary. In Chancery, June 12.

A Feme covert being intitled to 100*l.* *bank-stock* as administratrix to her late mother *Mary Dowse*, and to 600*l.* *bank-stock* as executrix to her late uncle *William Fletcher*; her husband in *February 4, 1743.* made his will, and thereby devised to his wife all that 700*l.* *India stock*, which he was intitled to, interested in, or possessed of, to dispose of as she should think fit; at the time of making his will, the husband had no stock at all in any of the funds, but soon afterwards his wife transferred to him the 700*l.* *Bank stock* which she was intitled to as aforesaid, and the same stood in his name at the time of his death, which happened soon afterwards; the husband also before his marriage gave a bond in 1731. that he would leave her 500*l.* The wife soon after died, having made her will, and appointed plaintiff her residuary legatee, under which claim the plaintiff has brought his bill for the 700*l.* *Bank stock.*

Feme covert as executrix to A. and administrator to B. is intitled to 700*l.* *Bank stock*, her husband devises to her 700*l.* *India stock* which he is interested in, or intitled to, and after making his will she transfers it to him, the *Bank stock* shall pass.

It appears in proof that the husband had no *India stock*, nor any stock at all at the time of making his will, that the wife's mother or uncle owed no debts.

Per Lord Chancellor: The husband before the stock was transferred to him had an interest therein, and though he had not such an interest as he could have transferred without his wife, yet *that* will make no difference, for the mother and uncle owed no debts. 2*dly*, The description of the thing is only a mere mistake, for it is plain the husband meant the *Bank stock*, because it agrees with the sum; and there are many cases of the like kind, where the names of the devisees, and descriptions of the things devised, have been mistaken, and yet (when the testator's meaning and intention is plain) have been held good; as where a man gives his *black horse* and has only a *white horse*, the *white horse* shall pass; so also where a legatee's Christian and surname are both mistaken, as in

Beaumont v. Fell, 2 P. Wms. 141. So in Ro. Abr. 614. p. 4. A man devised lands in such a place, he had no lands, but only tithes there, which passed. Suppose the husband had assigned his interest in the stock before his wife transferred it to him, it would have been good, like the case where the husband disposes of his wife's term for years; besides, I am of opinion that the husband was bound to provide for his wife, which strengthens this case. Decreed for the plaintiffs.

Chitty's Case. B R.

The King's debtor committed by the Exchequer to the Fleet brought into B. R. by ha. cor. and surrendered in discharge of his bail, may be removed again to the Fleet by an ha. cor. from the Exchequer.

CHITTY was committed to the *Fleet* by the court of Exchequer for a contempt in not paying the sum of 1700*l.* a debt due to the crown, and was now brought into this court by his bail by virtue of a *habeas corpus*, and by them surrendered to the marshal in discharge of themselves in a cause depending *here*, whereupon Mr. Attorney General moved for a rule to remand him to the *Fleet*; but *per curiam*, You must bring an *habeas corpus* from the Exchequer, and the marshal shall now return it to *that* court, who may then recommit Chitty to the *Fleet*; and this has been often done both in civil causes between subjects, and in criminal causes at the suit of the crown.

The Duke of Bedford *versus* Alcock. B. R.

Joint counts in an action. Debt upon an amercement in the leet, founded upon a presentment by five ale-conners, and upon a mutatus may be joined in the same action.

ACTION of *debt* for an amercement in a court leet; the declaration sets forth, that the Duke is seised of the manor of *St. Giles in the fields Bloomsbury*, and that there is a custom within the manor for six ale-conners to be appointed by the steward; that they, or the major part of them, ought to view, search into, and weigh all the loaves of bread within the manor not exceeding three-penny loaves, or half quartern loaves, to see whether the same be of due weight; that they are to present every such baker whose bread is found wanting in its due weight, and that if any baker hinders those ale-conners from searching and weighing his bread, after request and refusal they may present such baker at the next court leet; that the defendant Alcock on the 15th of April 1746. was an inhabitant and baker within the manor, and that at a court leet held the 15th of April 1746. six ale-conners were appointed and sworn in order to search and present as aforesaid; that five of these ale-conners on the 17th of June 1746. perambulated the manor, and went to the house of the defendant to weigh his bread, and that the defendant refused to permit them to weigh it; that therefore at the next court leet they presented the defendant to the court, who amerced him which amercement was then assessed by three assessors to thirty-nine shillings to be paid to the plaintiff the lord of the manor, whereby an action accrued,

The

The second count in the declaration sets out another custom, that at every *Easter court leet* in this manor a jury is appointed to search and weigh the bread of all bakers in the manor that are above the price of three-penny loaves, that the jury perambulated the manor in order to search and weigh bread, &c. that the baker the defendant refused to permit this jury, which consisted of 31 persons, to weigh his large bread, or to view it, therefore they presented the defendant to the leet, which *amerced* him, which *amercement* was *affeered* to 39 s. by which an action accrued to the plaintiff; the third and last count, is upon a *mutuatus* for 22 shillings, making up the whole demand in the declaration, which is of a plea of debt that the defendant may render to the plaintiff 5 l. which he owes to, and unjustly detains from him, &c.

There is a general demurrer to the declaration and a joinder in demurrer. This case was argued by Serjeant *Wynne* for the defendant, and Serjeant *Bootle* for the plaintiff, in *Trinity* term last.

Serjeant *Wynne* for the defendant: The custom for *six* persons to present is bad, because it could never have any legal commencement, being against a well known principle of the common law, which requires that all offences shall be presented by a jury of *twelve* men at the least. 1 *Ro. Abr.* 564. pl. 17. *Cro. Car.* 259. S. C. *Cro. Eliz.* 654. 1 *Sid.* 233.

The custom is also bad in another respect; it is laid, that if any baker refuses to let these *ale-conners* weigh and search his bread they are to present him; I say this is bad, because the *court leet* has no such power *out of court*, so cannot delegate these *ale-conners*, they may *fine* and *imprison* for offences in court, but have no consuance of matters *out of court*.

It is also laid, that if any bread be found wanting in the *assize* they may *present*, &c. It is certain the *assize* of bread varies very often, and it ought to have been specified what was the *assize* of bread at this time; in 2 *Salkeld* 687. *Rex v. Flint*, an indictment for selling bread too light was held bad by *Holt & Cur'*, because it was not laid what was the due weight, or how much was wanting; besides the offence of making bread too light is a new offence, made so by statute, and therefore there could be no such custom as is laid.

It does not appear by the declaration *where* the *court leet* was held, nor is it said in *what sum* the defendant was *amerced*, but only that he was *amerced*, and that *amercement* was *affeered*, it ought to have shewn how much the *amercement* was * *Hob.* 129.

* *Salk.* 56.
contra.

Quere the
case Winter
v. Norris,
Hil. and East
8 Geo. 2.
debt for an
amerement
in Stepney
court cured
after a verdict

It may be questioned whether the lord be intitled to the *amerements*, for the crown may grant a *leet* and reserve the *amerements*, and if the lord be intitled it may be a question whether an action will lie; I admit he may distrain, and that an action will lie for an *amerement* in a *court baron*, but I do not know that it will in a *court leet*.

The *mutuatus* cannot be joined with the two first counts, because it is matter *in pais*, and the other counts depend upon the records of the *court leet*; and it appears the *leet* adjourned, which it could not do.

Serjeant *Bootle* for the plaintiff: The *court leet* has original jurisdiction as to the *assize* of bread, and if there was not some way to force *bakers* to permit the proper officers appointed by the court to view their bread, the jurisdiction would be nugatory, *Kitch.* 12. p. 26. *ale-conner* is an officer of the *leet*, and by his oath in *Kitch.* 46. b. he is to see that bread sold from time to time be of due weight. And by the *stat.* 8 *Annæ* c. 18. the rights of lords of *leets* are saved as to *assize* of bread.

It is objected that it is not averred *what* the *assize* of bread was at the time of the presentment; to this it is answered, it is not necessary, for the custom is to see it be of due weight.

It is also objected that it is not said *where* the *court leet* was held; to this I answer that it is alledged to be holden within the manor, and there is no occasion to say at what *house*, or *sign*.

It is further objected to the *amerement*, that it is not said *what sum*; to this *Salk.* 56. is an answer. And in *Mich.* 3 Geo. 2. B. R. *Stevens v. Howard*, in debt for an *amerement* in the court of the *Dean and Chapter of Westminster* this objection was taken, that it was not said how much the *amerement* was, only that the party was *amerced*, which was *offered* to so much, and the objection was over-ruled.

I admit there may be a grant of a *leet*, and the *finés* and *amerements* reserved to the crown, but the court will not presume this; it must be shewn on the other side; the lord is *prima facie* intitled to the *amerement* and to this action, and the books are full of precedents to this purpose.

In the case of *Wicker* and *Norris*, there was a custom that the jury might adjourn in the *leet*; and Lord *Hardwicke* thought the custom good.

It

It is objected the *mutuatus* cannot be joined, if so, this court will have no jurisdiction for *amercements* under 40 shillings.

Lee Ch. Justice: *Hob.* 129. (cited) as has been often denied to be law.

This case was argued the second time by Mr. *Jedrell* for the defendant, and Mr. *Ford* for the Duke, in *Hilary* term last.

Mr. *Jedrell* for the defendant: The *court leet* is derived out of the *torn*, and is a kind of *inferior torn* granted to lords of manors, who, otherwise were formerly obliged to appear at the *sheriff's torn*, and as the jury in the *torn* were of the very essence of that court; so they must likewise be in the *leet* which is derived out of the *torn*, 2 *Inst.* 71, 72. and therefore it is contrary to law for *six* jurors to present offences in the *leet*.

The statute of *Weslm.* 2. c. 13. was made to prevent sheriffs in their *torns* from fining without a jury of *twelve* men at least, and it extends to presentments in the *leet*, as Lord *Coke* in 2 *Inst.* 338. expressly says, and that this statute of *Weslm.* is only declaratory of what was (before) the common law, for there is no saving of any customs in the statute; if this custom to present by *six* jurors was in this *court leet* before the statute, it is now abolished by the statute, if this *leet* was taken out of the *torn* since the statute this custom is bad, being contrary to it. The *steward and jury* constitute the *leet*, for without *these* it cannot exist; the *jury* is to present, and the *court* to punish, and a custom to take away the office of judge and jury of 12 men is against law.

The offence for which the defendant is amerced is not within the jurisdiction of the *leet*, for if it was, what occasion was there for the *stat.* 8 *Ann.* c. 18. which gives power to justices of the peace to enter *bakers* shops and weigh their bread; like the statute which gives the like power to inspect *apothecaries* shops; and this power given by statute, is what never could exist at common law, for no man could enter another man's house; and if the defendant be obliged to permit his bread to be weighed in his house, it would be for him to find evidence against himself. I admit they have power to perambulate the *leet*, and may buy the defendant's bread, and if the same be under due weight may convict him in the *leet* by a proper jury; but this custom to enter a man's house, in the manner it is laid, is very inconvenient, and inconsistent with the liberty of the subject.

Ford for the plaintiff: *Courts leet* have been time out of mind, and it appears by our most ancient statutes that they have had jurisdiction

dition of almost all offences against the public. *Stat. 51 H. 3. de pane & cervisia.*

I admit that a presentment by *six jurors* in the *torn*, would be bad, but it does not from thence follow that it would be so in the *leet*, for the words in *Westm. 2. c. 13. et sic observetur de quolibet balivo libertatis* does not include the steward of the *leet*. *Co. 2 Inst. 388.*

The only true standard and criterion of a court *leet* is the custom and usage of the place, *Keilw. 140. 1 Ro. Abr. p. 11, 12. Hard. 56. Lane 55, 56. Cart. 177.* and where the custom only extends to affect the *person* by a jury of *six persons* that may be good, but if the freehold be concerned there must be a jury of *twelve*. The presentment by *six jurors* is not conclusive, the party who thinks himself aggrieved may have a *replevin*. *Cro. Jac. 583.* That an action of *debt* lies for an *amercement* in the *leet*. *Rast. 151. Old Book of Entries 63. b. Cro. Jac. 582. 1 Brown Ent. 154, 168, 169, 170, 171.* That debt for an *amercement* and a *mutuatus* may be joined. *2 Brown Ent. 83, 84.*

Judgment of the court.

This term *Lee* Chief Justice gave judgment of the court for the plaintiff.

If one count in a declaration be good, though all the rest be bad, there shall be judgment for the plaintiff upon a general demurrer to the whole.
Vide part 2. 321. S. P.

Plowd. 182. b.

Lee Chief Justice: There are three counts in the declaration to which there is a general demurrer, so that if any one of the counts in the declaration be good, judgment must be for the plaintiff, if such count can be properly joined with the other two; and we are all of opinion that the count upon a *mutuatus* is good, and may be joined with *debt* for an *amercement* in a court *leet*, and that they are not actions of different kinds; the whole three counts are for a *debt* created by different means, but all upon contracts; the *two first* upon implied contracts in law, and the *mutuatus* upon an express contract; and the true way to judge of this matter is *this*, that whenever the same process and judgment are in two counts they may be joined, otherwise they cannot; the process and judgments in all the three counts are the same, and they are very similar, for as *debt* on an *amercement* cannot be maintained against an executor, so neither can *debt* upon a *mutuatus* be maintained against an executor, because *wager of law* lies in both, *Slade's case 4 Rep. 93. 1 Vent. 366.* *debt* on a judgment and a *mutuatus* may be joined; so may *debt* on a bond and a *mutuatus* although there be different pleas required, because there is the same process and judgment. *Debt* and *detinue* may be joined. *Bro. Joinder in action pl. 97.* In *2 Salk. 772.* is a precedent of a record, which was error from the C. B. argued by Serjeant *Chesbire* and Serjeant *Pengelly*, in an action of *debt* on an *amercement* in a court *leet*, and a *mutuatus* joined, but it was not objected that they might not be well joined; and there-

fore as the *mutuatus* in this case is a good count, and may be joined, we must give judgment for the plaintiff, for *non constat*, but that upon a trial the plaintiff might be able to prove *that* count, and might take verdict upon the same, though the other count, should be bad, and therefore we have no occasion to give any opinion as to the other two counts.

Michaelmas Term

23 Geo. 2. 1749.

Kenchin *versus* Knight. B. R.

TRESPASS *quare clausum fregit*; the defendant pleads a custom that all the tenants and occupiers of certain ancient messuages have a right of common in the place where, &c. as belonging to the said ancient messuages, for all their cattle *levant and couchant* on those messuages, and under such custom justifies the putting in his swine, &c. The plaintiff replies and confesses the custom as pleaded to be true as far as it goes, but adds, that the custom goes farther, that is, that they must be rung to prevent their rooting up the soil; the defendant demurs generally to this replication. This case was argued twice at the bar; it was objected for the defendant that the replication was bad for want of traversing the custom in the plea.

*argued by Butler
J. in Balla Hubert
C. 17.
7/11/6346*

If a custom be pleaded, another custom repugnant to it cannot be replied without a traverse, but a custom or matter consistent with it may, without a traverse.

Per curiam: When a particular custom is pleaded, another custom repugnant to it cannot be replied without traversing the custom insisted upon in the plea, for if it were otherwise, pleadings would run to an infinite prolixity; but this is not the present case, for the plaintiff, in his replication, admits the custom in the plea so far as it goes, and then says there is another thing to be done, which is quite consistent with the custom, and that is, to ring the swine, which is rather a qualification of the custom pleaded, than a different one; and this replication brings the matter to a single point, which is the end of special pleading; and we all think the replication is very good, but have some doubt whether the plea be good, for it

PART I.

T t t

seems

seems to be new to plead this as a custom, for right of common has not been pleaded by way of custom only in the case of copyholders, which is of necessity; but we give no opinion as to the plea, the replication being good, there must be judgment for the plaintiff.

Taylor *versus* Joddrell. B. R.

The defendant permitted to plead a special justification after he had pleaded the general issue, upon terms.

IMPRISONMENT: defendant pleaded the general issue inadvertently, and now moved to withdraw it, and for leave to plead a justification that he was master of a ship, that the plaintiff was making a mutiny therein, and so he imprisoned him; this was done in *Blackburn v. Matthews* upon terms of taking short notice of trial. And in *Tarlton v. Wragg*, Trin. 20 Geo. 2. defendant pleaded the general issue, and wanting afterwards to pay money into court, the defendant had leave to withdraw his plea, pay money into court, and plead the general issue again. In Trin. 21 Geo. 2. *Water v. Bowell*, the defendant in Hilary term before, having pleaded two pleas had leave in Trin. term following to plead a third plea; and in Mic. 21 Geo. 2. *Jefferys v. Walter ante 177.* leave was given to withdraw *non est factum*, and to plead the statute of gaming.

Per curiam: There are many instances of this having been done when the court can prevent the plaintiff from suffering any inconvenience by it, as by obliging the defendant to take short notice of trial, and that if there be a verdict for the plaintiff he shall have judgment as of the present term; therefore let the defendant be at liberty to plead a justification, and the general issue also, if he pleases, upon the terms mentioned.

Rex *versus* Fitzgerald. B. R.

A person committed by a secretary of state having been imprisoned two years without prosecution, discharged.

THE defendant was brought up by a messenger to the secretary of state upon a *ba. cor.* whereupon it was returned that the defendant was taken up by a warrant from the secretary of state, and committed to his custody two years ago, on suspicion of *high treason*; and now it was moved by Mr. Henley that the prisoner might be discharged absolutely; Mr. Attorney General for the crown opposed his being absolutely discharged, and insisted he ought to give bail, although at the same time he admitted he had no particular act of *high treason*, or any evidence thereof, to charge the defendant with, or lay before the court. Mr. Henley *toris viribus* opposed his being obliged to give bail, and insisted he had a right to his liberty, this being an illegal commitment; *1st*, Because there is no charge of any fact, or any ground of suspicion, nor does the warrant men-

tion

tion either; 2dly, The commitment is illegal, because the warrant is only to bring him to be examined, not to commit him, and he cannot be committed to a messenger, for messengers never make any returns to justices of *oyer and terminer*, and the defendant has been a prisoner ever since February 1747. *Per curiam*, Here is nothing but suspicion, no fact alledged against the defendant, and unless Mr. *Attorney* will undertake to prosecute directly, and have the defendant tried, he must be discharged without bail; upon which it was adjourned till next day, when the defendant was brought up again; and Mr. *Attorney* then declaring that he had no instructions to prosecute, the defendant was discharged absolutely.

Bull *versus* Steward. B. R.

ACTION upon the case against the defendant, bailiff of the *Borough court of Southwark*, for an *escape upon mesne process*; the declaration sets out the levying the plaint and proceedings in the *Borough court* until the arrest, and that the defendant *Alice Rawlins* in that action being in the now defendant's custody, he suffered her to escape to the plaintiff's damage; upon the general issue there was a verdict for the plaintiff at last *Surry* assizes. And now it was moved in arrest of judgment that the present declaration was ill; 1st, Because it appears that the plaint in the court below was levied against two persons, *John Warner* and *Alice Rawlins*, but only one was proceeded against, so that the plaintiff by process against one only could not have had the effect of his suit below; to this it was answered and resolved *per curiam*, That even supposing the plaint to be erroneous, yet the officer shall not take advantage thereof in a collateral action as this is, and he may justify the arrest under the process, and he shall not be suffered to say in this action that the plaintiff could not have had the effect of his suit below. 2dly, It was objected that the declaration doth not alledge in what manner *Alice Rawlins* was indebted to the plaintiff, but only in general that she was indebted; it might be upon a judgment, or such a debt as *that court* has no jurisdiction of, nor does it appear that the cause of action arose within the jurisdiction; to this it was answered and resolved *per curiam*, That this being after a verdict we will suppose every thing proved at the trial which was necessary to be proved, and that the cause of action arose within the jurisdiction, unless the contrary could be made to appear upon the face of this record. Judgment for the plaintiff.

Escape upon mesne process issued out of the borough court against the bailiff thereof, defendant here shall not take advantage of any error in the process below under which he may justify.

After a verdict the court will suppose every thing to be right unless the contrary appears on the record.

Anonymous.

Anonymous. B. R.

Amendment
Declaration in
a qui tam ac-
tion amended.

THIS was an action *qui tam* upon the statute to prevent fraud in the admeasurement of coals: Sir J. Strange moved for leave to amend the declaration, and cited 3 Lev. 347. *The Dutcheſs of Marlborough v. Widmore*, 2 Stra. 890. and *Wynne qui tam v. Middleton*, which was an action for a false return of a member of parliament wherein the court gave leave to amend the declaration, and upon shewing cause the rule for the amendment was made absolute; *per curiam*.

Hilary Term

23 Geo. 2. 1749.

Saunders *versus* Fortescue. B. R.

Nomine replegiando brought for plaintiff's wife, who dies after appearance and before a plea, Quære, whether the suit shall stay?
Skin. 337.
4 Mod. 183.
Carth. S. C.
Salk. 581,
705.

AN *homine replegiando* being brought against the defendant for the wife of the plaintiff, an *alias* and *pluries* issued thereupon, to the last of which writs the defendant appeared; notwithstanding *that*, a *capias in Withernam* was issued against defendant, which was held to be irregular, and therefore all process thereon way stayed.

The wife of the plaintiff being dead since the defendant's appearance, it was now moved that all proceedings in this action be stayed; *1st*, Because the party detained is a necessary party to this suit; *2dly*, From the form of the condition of the recognizance of bail in this action, which is that the party defendant shall appear *de die in diem*, plead *non cepit*, &c, and if judgment shall pass against him he shall render the body of the plaintiff's wife, or his own body in *Withernam*, and shall also pay the damages and costs recovered by reason of the taking and detaining, &c. Now the plaintiff's wife being dead, it is impossible to deliver up the person of the woman, or to comply with the condition of the recognizance; and plaintiff may have an action for the detainer *per quod consortium amisit*.

Cro. Jac. 538.
Cro. Car. 89.
go.
2 Sid. 346.

To this it was answered for the plaintiff that this action is brought for two purposes; 1st, To remove the custody of the person taken and detained; 2^{dly}, For damages; and although the first cannot be had in this case because of the death of the party detained, yet if the taking and detaining of the plaintiff's wife has been unlawful he shall recover damages, and if cattle die pending a replevin, yet the suit shall go on.

Per curiam, It is too much for us to stay this suit upon a motion, and therefore let the plaintiff declare, and the defendant may by pleading take what legal advantage he can.

Hanson *versus* Parker. B. R.

822 £ 700
11 Bing 349
9A16935

THIS is an action of *debt* upon a bond, with condition for the payment of a certain sum of money to one *Lydia Dovey*; the defendant craves *oyer* of the condition, and pleads payment *post diem* to *Lydia Dovey*. At the trial it was given in evidence that *Lydia Dovey* in conversation touching this bond, being asked if the defendant owed her any money, declared he did not owe her any thing, whereupon the jury gave a verdict for the defendant. And now it was moved for a new trial, that the declaration of *Lydia Dovey*, who was not the party plaintiff in this action, ought not to affect the plaintiff, and *Lydia Dovey* made an *affidavit* that the money had not been paid to her, and that she looked upon the defendant to be indebted to the plaintiff who was the obligee in the bond.

Debt upon bond with condition for payment of money to a third person *Lydia Dovey*, who declares defendant owes her nothing, and a verdict for defendant, such declaration was proper evidence; for *Lydia Dovey* is to be considered as the real plaintiff.

But *per curiam*, A new trial was refused, for *Lydia Dovey* is to be considered as if she were really plaintiff, and the action (as appears to us) is brought for her benefit; and if the condition of the bond (being taken for payment of money to her) was capable of any explanation, it ought to have been explained to the jury at the trial, and we cannot admit of *affidavits* to explain evidence given at a trial, so the plaintiff took nothing by the motion.

note Sand. 219.d. by Ser^t Williams

Skelton *versus* Hawling Executor, &c. B. R.

note Luthw.
674.
If an executor or administrator confesses judgment, or suffers it to go against him by default, he thereby admits assets in his hands, and is estopped to say the contrary, in an action on such judgment suggesting a devastavit.

SKELTON brought *debt* upon a bond against *Eliz. Maddox* an administratrix who suffered judgment to go against her by default; she makes her will, and the defendant *Hawling* executor thereof, and dies; and this action upon the judgment is brought against *Hawling* ^{in the debt} suggesting a devastavit. *Hawling* pleads that he has fully administered the goods and effects of *Eliz. Maddox*; and to prove a devastavit the judgment by default was given in evidence at the trial; and whether a judgment by default against the defendant's testatrix, who was an administratrix, is an evidence of a devastavit, was referred for the opinion of the court.

For the plaintiff it was insisted, that if an executor or administrator confesses judgment or suffers the same to go against him by default, he admits assets in his hands and is estopped to say the contrary upon a devastavit returned, and so is a jury. 1 Salk. 310. Comyn 87. S. C. And in 6 Mod. 308. if an executor suffer judgment to go against him by default, upon executing a writ of inquiry he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir, for he should have pleaded *plene administravit*, or specially, *what assets he has*. So if judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a devastavit, as if it had been found against the executor by verdict, for *per curiam*, He hath charged himself by his own plea, Cro. Eliz. 102. *Wharton v. Richardson*, widow, administratrix in this court, Trinity term 10 Geo. 2. there were two *scire facias's* against the defendant as administratrix of her late husband to shew cause why *Wharton* should not have execution of a judgment recovered against her husband, both which writs were returned *nichils*, whereupon a *scire fieri inquiry* issued; the defendant attended the execution thereof, and offered to lay an account of the assets of her late husband before the sheriff and the jury, but the plaintiff insisting that the award of execution upon the said *two nichils* was legal evidence of assets, the jury found a devastavit; afterwards she appeared to the *scire fieri inquiry*, pleaded *plene administravit*, and traversed the inquisition which found a devastavit, but not expecting to succeed in the trial of this issue, she moved the court to have the award of execution set aside upon the *scire facias's*, and to be permitted to plead thereto, upon proof to the court that the assets in truth amounted to a very small sum (incomparison to the debt in demand), which she offered to deliver up; and to be examined upon interrogatories; and though the court thought this a very hard case, she having had no notice of the *scire facias's*, yet they refused to let her in, to plead to the *scire*

scire facias's, or to relieve her, she having acquiesced too long: from this case it appears plainly that the counsel for the defendant *Richardson* and the court took it to be certain that the award of execution after two *nichils* was evidence of a confession of assets.

There was a case of *Challoner v. Challoner* before Lord *Hardwicke* at the sittings in *Middlesex* after Hilary term 1736. The plaintiff having recovered a judgment by default against the defendant as administratrix, in debt upon a bond given by the intestate, brought an action upon that judgment against the same administratrix, suggesting a *devastavit*; upon *nil detinet*, the plaintiff at the trial gave in evidence a copy of the judgment by default, which was held to be sufficient evidence by Lord *Hardwicke*, who sent for *Salkeld's reports* into court, and held 1 *Salk.* 310. for good law.

On the other side it was argued for the defendant *Hawling*, that although the judgment by default against *Maddox* might be considered as an admission of assets by her in case an action had been brought against her upon that judgment, yet in the present action against her executor it shall not be so; and there is no case in the books in point for the plaintiff.

In *Bird v. Culmer*, *Hob.* 178. and 1 *Ro. Abr.* 929. B. p. 3. the defendant pleaded *plene administravit*, and afterwards *relicta verificatione cognovit actionem*; and *Richardson* prayed judgment *de bonis propriis*, but the court said that the judgment only confessed the action, not assets, and the plaintiff had judgment only *de bonis testatoris*.

If a judgment by default be evidence of a *devastavit*, why does not the plaintiff immediately thereupon take out execution *de bonis propriis*, and yet this never was done.

As to 6 *Mod.* 308. that is a resolution upon no case stated; and the case on a demurrer in *Cro. Eliz.* 102. differs very much from the case at bar, and so does *Wharton v. Richardson*.

If every judgment against an administrator or executor by default be evidence of assets, they must be obliged to controvert every action which shall be brought against them, which would be of great inconvenience, for whoever pleads *plene administravit* does so at the peril of costs.

Before the *stat.* 4 & 5 *W. & M. c.* 24. s. 12. there was no action against an executor of an administrator.

The

The court after having taken time to consider gave judgment, That if an executor or administrator suffers judgment to go by default or confession, and an action be brought against him on that judgment suggesting a *devastavit*, he cannot plead *plene administravit*, for by the confession of the judgment, or letting it go by default, he has admitted assets to the amount of the demand; and it is the same, if the action on the judgment be against the executor or administrator of an executor or administrator. Judgment for the plaintiff.

Ryall versus Rolle. In Chancery, before Lord Hardwicke, assisted by Lee Chief Justice B. R. Parker Chief Baron of the Exchequer, and Burnett, one of the Judges of the C. B.

Mortgage of goods and choses in action, is fraudulent as against creditors, if the goods, &c. be not delivered to the mortgagee.

WHO delivered their opinions *seriatim* upon the 27th of January, and unanimously gave judgment, that if a man mortgages his goods and chattles and debts for a valuable consideration, and the mortgagee permits the mortgagor to keep possession, and to have the ordering, selling and disposing thereof, this gives the mortgagor a false credit, is fraudulent against creditors, and the mortgagor afterwards becoming bankrupt, the assignees under the commission are intitled to have these goods, &c. for the benefit of themselves and the rest of the creditors seeking relief under the commission, and the mortgagee can only come in for his proportionate share under the commission.

The principal part of the case was this: That *Harvest* and *Stevens* were partners in a brewhouse at *Kingston upon Thames*, that *Harvest* for a valuable consideration mortgaged to *Potter* in trust for *Stevens* his (*Harvest's*) moiety of the brewhouse, coppers, coolers, backs, tunns, tubs, goods and chattles, and debts in the brewhouse and trade; that from thenceforth afterwards *Harvest* and *Stevens* still continued to carry on the trade together, *Harvest* appearing in every respect as much proprietor and owner as he was before he made the mortgage, having joint possession of the brewery, and acted in every thing as he had before done, and sometime afterward became a bankrupt.

The general question therefore was, whether this mortgage as to the personal estate was not fraudulent as against creditors within the statute of the 21 Jac. 1. c. 19. *sect* 11. which enacts, "That if
" at any time thereafter any person or persons shall become bankrupt,
" and at such time as they shall become bankrupt shall by the consent and permission of the true owner and proprietary have in their
" possession,

“ possession, order and disposition any goods or chattles whereof
 “ they shall be reputed owners, and take upon them the sale, alte-
 “ ration or disposition as owners, that in every such case the com-
 “ missioners under the commission of bankrupt shall have power to
 “ sell and dispose of the same for the benefit of the creditors who
 “ shall seek relief by the said commission, as fully as any other part
 “ of the estate of the bankrupt, and for the better payment of debts,
 “ and discouraging men to become bankrupts”.

It was argued at the bar that there was a great difference between a pawn of goods, and an *hypothecation* or *mortgage* thereof, for that goods pawned must be delivered to the *pawnee* who has no property in them, but they are only deposited as *gages* or *pledges*, but goods mortgaged need not be delivered. *Justin Instit. lib. 4. tit. 6 sect. 7.* to this it was answered and resolved by the whole court, that a mortgagee of goods moveable, and *choses in action*, is the true owner thereof, and that therefore the same ought to be delivered to the mortgagee as much as they may, or possibly can be, that is to say, by delivering the goods themselves specifically, or the key of the warehouse wherein they are, with the possession thereof, and by delivering the muniments, books and writings relating to the *choses in action*, and enabling the mortgagee to reduce the same into possession by action or suit. And as this has not been done in the present case, and *Harvest* still appeared to be the reputed owner of the moveable goods, and *choses in action*, the whole court adjudged the mortgage to be fraudulent as aforesaid, and Lord *Hardwicke* decreed accordingly.

Rex *versus* Phillips. B. R.

A Rule was made by consent to try the validity of a *by-law*, and that if the *by-law* should be found to be a good one, then the judgment upon the information should be entred for the prosecutor, if bad, then for the defendant. It was found to be a bad *by-law*; and now it was moved that there might be no costs; but *per totam curiam*, The judgment must be entred according to the rule, and costs follow of course.

Costs where there is a trial by consent.

Brewster *versus* Capper. B. R.

S. C. 1. 134. Prep. 51

DEFENDANT pleaded a *misnomer* in *abatement*, which was after an *imparlance*, thus: “ At which day came *Ham John Crapper* (the defendant’s true name) who is sued by the name of “ *John Capper, &c.*” to which the plaintiff demurred; and objected that this plea being in *abatement* ought to have been pleaded

What shall be a special imparlance in pleading misnomer in abatement.

PART I.

X x x

of

*This case overruled
 7. T. R. 447.*

of the same term with the declaration, or after a *special imparlance*, and that this is after a *general imparlance*. But *per curiam*, This *imparlance* by the true name is *special* for this purpose, but if he had said *venit prædict' John Capper* it had been bad, for that would have confessed that *John Capper* was the true name. *Kelw. 93. b.* Judgment for the defendant.

Wolfe *versus* Collingwood. B. R.

Although the sheriff takes a bail bond on the stat. H. 6. yet that is at his peril, and the plaintiff shall not be thereby concluded.

COMMON rule upon the sheriff of *Surry* to bring into court the body of the defendant. Mr. *Smythe* the King's counsel moved to discharge this rule, alledging that the sheriff had taken a bail-bond which he was obliged to do by the stat. *Hen. 6.* and had permitted the defendant to go at large, and could not by law take his body again and bring it into court.

Lee C. Justice: The sheriff must either bring in the body or justify good bail in court, for the plaintiff is not to be concluded by the act of the sheriff.

Dennison Justice: The sheriff takes the bail at his peril upon the stat. *H. 6.* so the court refused to discharge the rule.

Harris *versus* Evans. In Scacc'.

Lease for one year, and so for two or three years, as the parties shall agree.

PER curiam, A lease to hold to *R. Harris* from *Michaelmas* for one year, and so for two or three years, or any further term of years, as the said *N. Evans* and *R. Harris* shall think fit, and agree from and after the expiration of the said term of one year, is a lease for two years, and after every subsequent year begun, is not determinable till that be ended, like 2 *Salk. 414.*

Evans *versus* Underwood. B. R.

What is a negotiable note within the stat. 3 & 4 Ann. c. 9.

ACTION upon a promissory note brought by *Evans* the indorsee against *Underwood* the drawer: The note set out in the declaration is, "I promise to pay to *George Pratt*, or order, eight pounds, upon the receipt of his the said *George Pratt*'s wages due from his Majesty's ship the *Suffolk*, it being in full for his wages and prize-money, and short allowance money for the said ship;" the indorsement by *Pratt* is set out, and it is averred that the defendant received the said wages from the said ship. Upon *non assumpsit* pleaded, the jury gave a verdict for the plaintiff; and now it

it was moved in arrest of judgment, that this note was not negotiable within the *stat.* 4 & 5 *Ann. c.* 9.

Mr. Hume Campbell for the plaintiff, to shew this was a negotiable note cited several cases, and principally relied upon *Andrews v. Franklyn*, which was in Hilary term 3 Geo. 1. in this court; case upon a promissory note to pay money within two months after the ship called the *Devonshire* should be paid off, and the plaintiff declared upon the statute; it was there insisted that the note was not negotiable, the promise to pay being upon a contingency which might never happen; *Sed per curiam*, The paying off the ship was morally certain, and the note is within the statute and negotiable. And in *Coleban v. Cooke*, Mich. 15 Geo. 2. in C. B. J. Cooke on 27th of May 1732. made a promissory note, whereby he promised to pay to H. Denham, or order, 150*l.* six weeks after the death of his father J. Cooke, Esq; for value received, which was indorsed to Coleban; J. Cooke the father died April 2, 1741. and the indorsee brought an action, and had judgment in the Common Pleas, that the note was negotiable after three arguments, for there was no contingency whereby the note might never become payable, and was only uncertain as to the time; and the judgment of the C. B. was affirmed upon a writ of error in B. R. Mich. term, 18 Geo. 2. and the court said ^{2 Stra. 1217.} that no certain precise form of words are necessary to be used in a bill of exchange or note of hand, and that "I promise to be accountable to A. or his order, for 100*l.* value received," would be a good negotiable promissory note.

On the other side it was said by Mr. Ford for the defendant, that the case of *Andrews* and *Franklyn* was never determined, and that in the case of *Coleban v. Cooke*, the payment was certain in all events, for the father must die some time or other, but it was uncertain whether the ship *Suffolk* would ever be paid off or not.

Lee C. Justice: The case of *Andrews v. Franklyn* is very like the present; we will look into that case and see whether it was determined; the court inclined to give judgment for the plaintiff, and after looking into the case cited, did so, *ut audiui*. ^{1 Stra. 24.}

Traverse *versus* Buckley and his Wife. In Chancery before Lord Hardwicke, assisted by Sir John Strange, Master of the Rolls.

If a bill be brought against a joint baron and feme, and she alone be taken by process of contempt, and afterwards enters her appearance, and prays time to answer without her husband, this is regular.

THIS is a bill exhibited against husband and wife, who are joint administrators in her right of the goods and effects of her former husband, for an account of his personal estate, &c. Upon the 6th of October last both the defendants were served with a *subpoena* in France, the husband continuing abroad, the wife comes into England, and for want of an appearance is taken up by process of contempt, which issued against them both; she being a prisoner gave a bail-bond for her appearance, and applied for time to answer, which was refused, unless she would enter her appearance with the register, which she accordingly did, and thereupon had time to answer separately without her husband.

It was moved on her behalf that it is irregular to take up a *feme covert* upon an *attachment* to compel her to appear separately; and secondly, That her subsequent appearance shall not hinder her from taking advantage of the irregularity.

Mr. Attorney General for Mrs. Buckley: A *feme covert*, except in very particular cases, (where she is *separately* interested) cannot act either for herself or husband, but where both are parties the husband can appear for both, her acts alone cannot affect him; and although she be executrix or administratrix, she can do no act without him, because if she could she might thereby make him subject to a *devastavit* and she could not be answerable for it. If an action be against the wife *only*, then she may appear and the husband may take advantage of it; but if they be *joined* in the action the husband is to do every act in the court of justice where the action is; the husband shall have all her property during the coverture, and her answer in the present cause without her husband will be nugatory, for no decree can be made against *her alone*; and I therefore insist that this appearance by the wife *alone* is void in point of law, and the *attachment* against her is irregular, and therefore the taking the bail-bond was under a *duress* much greater than a *duress* in a private case, as being done under the sanction of this court.

2dly, It is objected for the plaintiff, that the *feme* by appearing and praying time to answer, has waived all advantage she might have taken of the irregularity, (if it be one:) to this I answer, that her answer in this case without her husband will not (even) bind herself, much less can the court make any decree thereon to bind her husband.

On the other side it was said for the plaintiff, that the *feme covert* having entered her appearance, and prayed, and had time to answer, the question now, is not how far the plaintiff can go on, or the court can proceed to a decree, but whether this court can discharge her from these acts of her own?

This court is often under great difficulties by reason of the non-residence of parties in the kingdom, and therefore it will take all reasonable and equitable methods of extending its process for relief of suitors; and this is the more requisite to be done in this court where the parties to a suit are frequently more numerous than in the law courts, where they are seldom so; and it is every day's practice, in this court, to suggest in the bill that some of the parties are beyond sea, and you cannot compel them to appear, and to proceed against them and the *rest* upon *that* allegation. The cases of *Bell and Hyde, Eq. Ca. Abr. 65.* and *Dubois v. Hole*, shew that this court ought to extend its process as far as possible to compel appearance

And of this opinion was the *Lord Chancellor* and *Master of the Rolls*, and held the process of contempt regular and the appearance of the wife good both at law and in this court; to prove which, *Lord Chancellor* cited *Styl. 475. Att Lee v. The Lady Baltinglas*; and *1 Salk. 114. Carpenter v. Faustin*, shews that an appearance entered for the wife without the husband is not void, and if she alone be arrested she shall not be discharged, but upon common bail, and then new process shall go against the husband with an *idem dies* given to the wife; so is *1 Mod. 8.* The *Master of the Rolls* cited *Norwood v. Stevenson, Pasch. 10 Geo. 2.* where the husband refused to appear for his wife; she was brought in, in custody by a *habeas corpus*, and moved to be delivered to *John Doe* and *Richard Doe*, which is tantamount to an appearance, and it was granted and she discharged; this case proves that an appearance for the wife alone is not void in law.

Easter Term

23 Geo. 2. 1750.

Anonymous. B. R.

An agent's
bill cannot be
taxed.

A PPLICATION being made to a judge for an order to tax an attorney's bill, he made an order for the taxation thereof, upon the usual undertaking to pay what should appear to be due thereupon; the person who obtained the order attended the master several times, but the attorney, whose bill it was, never attended; and the master refused to tax the bill *ex parte*, because it was a bill for *agency*; and now Mr. *Lawson* moved that the Master might tax it *ex parte*; but *per curiam*, It is not within the act of parliament; and the Master said he never taxed a bill for *agency* in his life, so the Judge's order was held to be irregularly obtained.

Lamii versus Sewell. B. R.

A foreigner is
not bound to
give security
for costs

THE plaintiff resides at *Dunkirk*, and is a merchant there; Mr. *Bennè* moved he might give security for costs, or that the proceedings might stay until he did so. *Sed per curiam*, This was refused, because it would affect trade, and be excluding foreigners from obtaining justice in our courts, and is never done but in actions *qui tam*, &c. And they cited *Plumtree v. Mason*, wherein this was refused.

Rex versus Episcopum Eliensis. B. R.

Where it is
doubtful who
is the visitor
of a college,
the court will
not grant a
mandamus,
nor has it
been ever de-
termined
whether a
mandamus lies
to a visitor of
a college.

RULE to shew cause why a *mandamus* should not go to the *Bishop of Ely*, commanding him to hear an appeal made to him as visitor of *Trinity college* in *Cambridge*, by Doctor *Edward Vernon*, who has therein complained that he has been wrongfully deprived of his senior fellowship in the college, contrary to the statutes thereof, made upon affidavits that the *Bishop* declined hearing the appeal until he could be satisfied that he had a right to visit the college

Upon

Upon shewing cause Doctor *Vernon* grounded the *Bishop's* right to visit upon a body of statutes given to the college by *Ed. 6.* for the government thereof, wherein among other things the *Bishop of Ely*, for the time being, is to be the visitor of the college, and Doctor *Vernon* swears in his affidavit that he believes these statutes of *Ed. 6.* are the statutes which are binding upon the college, and to a true copy of them taken out of a book in the hands of the *Bishop* which appears to be signed by the King and his commissioners, but has not the great seal to it.

On the other side against a *mandamus* it appeared to the court that these statutes of *Ed. 6.* have never been put in ure; that the *Bishops of Ely* for 200 years last past have not visited this college; that these statutes are no where inrolled, that another body of statutes were given to the college by *Queen Eliz.* in which those of *Ed. 6.* are not taken notice of, although contradictory in many instances; the college annually on the 16th of *December* commemorate their founder and benefactors, and among the rest the preacher from the pulpit only says of *Edward the 6th* that he confirmed his father's grant, but when he comes to *Queen Elizabeth* he says, "she gave us the statutes by which we are governed." Besides, all the members of the college take an oath that they will observe and keep the statutes of *Queen Elizabeth*; and the book of the statutes of *Ed. 6.* nor any copy of it, is to be found among the archives of the college, nor does it appear they were ever received by the college, or that the *Bishop of Ely* has ever acted as visitor.

Lee Chief Justice: It appears from the affidavits laid before the court that there has been an appeal to the *Bishop of Ely* as visitor; that the *Bishop* has declined exercising any visitatorial power in order to take the opinion of this court whether he has any right to exercise it, and the affidavits only go to belief that the bishop is visitor; on the other side it appears that these pretended statutes of *Edward 6.* are found in the hands of the *Bishop*, without the great seal, and not in the college, and that the *Bishop* never visited the college, and this is to induce a belief that there are no real statutes of *Ed. 6.*

This is a controverted question, and it is not at all clear to the court who is visitor; and if we had seen and read all the statutes of this college, we have no authority to determine who is visitor, that being the proper province of a jury.

I shall give no opinion whether a *mandamus* to a visitor of a college be proper in any case whatever, it being a question which has never yet been determined; *Usher's* case, 5 *Mod.* 452. comes the nearest to the present case, wherein the then most eminent counsel at the bar were concerned. Serjeant *Wright*, (afterwards Lord Keeper)

er) *Cooper* and *Pratt* for the *mandamus* to a visitor of university college in *Oxford*, and *Northey*, *Harcourt*, and *Sir Barth. Shower* against it; and though the court was moved several times, yet at last they would do nothing in it.

It is well known that this court cannot grant a *mandamus* to compel any person to exercise a jurisdiction, which that person is not most clearly and certainly appointed to, and bound by law to exercise; and it would be most unjust to grant a *mandamus* to the *Bishop* in this case, who seems to decline the right of being visitor; for if he really has no jurisdiction he might be put to great trouble and expence by a *prohibition*. This is not like application to be admitted into corporations to try particular rights, but is to command a man to exercise a jurisdiction which he himself knows not whether he has any right to it or not; and no instance can be found where the court ever granted a *mandamus* to a person to exercise a jurisdiction, which it was doubtful whether he had power to exercise or not, and therefore I am of opinion the rule ought to be discharged.

Wright Justice *ad idem*.

Dennison Justice: This case is very different from the cases of *mayors*, &c. for if it appears doubtful whether a man be duly elected *mayor* or not, the court will grant a *mandamus* to try it. I shall give no opinion whether a *mandamus* in any case ought to go to a visitor of a college, but Judges have always been disposed not to meddle with these private donations.

If we grant this *mandamus* we must suppose the *Bishop* is visitor; when such a supposal may be false, for the *Bishop* does not tell us he is visitor; and if we should grant the writ and the crown be visitor, might not the *Attorney General* come for a *prohibition*, so that this court would be acting most absurdly by commanding and prohibiting a man to exercise one and the same jurisdiction; why then does not the *Bishop* proceed to determine upon the appeal, and if the crown has a right as visitor the *Attorney General* may come for a *prohibition*, and the matter may be properly tried.

Foster Justice *ad idem*.

Rule discharged.

Simmonds *versus* Middleton and another, the bail of
Parminter. B. R.

THIS was an action by original writ wherein the plaintiff obtained judgment against the principal, which was affirmed upon a writ of error in the house of Lords upon the 22d day of February 1748. Practice.
In regard to
proceedings
against bail.

Before the writ of error was brought, viz. on the 26th of April 1748. a *capias ad satisfaciendum* was left with the sheriffs of London in order to have a *non est inventus* against the defendant Parminter returned thereupon and to ground a *scire facias* against the bail; on the 27th of the same April the writ of error was allowed, and notice thereof given the 30th, which depended in the house of Lords until Feb. the 22, 1748. when the judgment was affirmed, whereupon the plaintiff sued out a second *ca. sa.* against Parminter, tested the 13th of February 1748. returnable the first return of Easter term 1749. Parminter then filed a bill against the plaintiff in the Exchequer, and thereupon obtained an injunction, which was not dissolved until December last, when the plaintiff sued out the first *scire facias* against the bail, tested the last day of last Michaelmas term, and returnable the first return of last Hilary term, whereupon a *nihil* was returned, and thereupon the second *scire facias* against the bail was sued out, tested the first day of Hilary term last, and returnable on the octave of the purification, which was the 9th of February, and the defendants (the bail) not appearing, a *nihil* was also returned upon that writ, and upon the last day of last term the bail came late at night and obtained a rule for the plaintiff to shew cause why the *ca. sa.* against the bail and the proceedings on the *scire facias* should not be set aside.

And now upon shewing cause, the court held the first *ca. sa.* sued out before the allowance of the writ of error was regular, although the sheriffs could not have arrested Parminter thereupon after notice of the writ of error; and as it appears that the first *ca. sa.* is now returned *non est inventus*, we will suppose it might be so returned after the writ of error was spent, nothing appearing to the contrary, and therefore it is regular; as to the 2d *ca. sa.* we have no occasion to say any thing upon that, here appears one *ca. sa.* regularly issued, returned and filed, and that is sufficient to ground the *scire facias* against the bail, and therefore the rule must be discharged, which was accordingly discharged upon the 26th of May 1750. and the same day execution was awarded against the bail, although they surrendered Parminter in discharge of them-

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selves upon the same 26th of May after the rising of the court before a Judge at his chambers.

Bail must render the principal the *quarto die* of the return of the second *scire facias* *se-dente curia*, or they come too late afterwards, even the same day.

And thereupon the bail came again to the court this term, and obtained a rule to shew cause why the award of execution against them should not be set aside for irregularity, upon an *affidavit* that the *principal* was rendered to prison upon the very day whereupon the former rule to quash the *scire facias*'s was discharged, and upon an *affidavit* that they had the defendant *Parminster* ready to be surrendered at the hall the last day of last *Hilary* term, in case the court had not then made the said rule to shew cause why the *scire facias*'s should not be quashed; *Sed per curiam*, The bail are now fixed absolutely with the damages and costs, for they ought to have rendered the defendant upon the 26th of May, sitting the court, and they came too late to a Judge's chambers after the court was risen; and in strictness as the proceedings are regular, they were fixed upon the *quarto die* of the return of the 2d *scire facias*, which was the last day of last term after the court was risen; and so the rule to shew cause why the award of execution should not be set aside, was also discharged.

Thrustout of the demise of Small *versus* Denny and others. In C. B.

Baron seised in fee of lands in A. and feme seised in fee of lands in C. before marriage settle the whole to the baron for life, remainder to the feme for life, remainder to the children of the marriage for such estates, &c. as the feme shall appoint, and for want of

EJECTMENT, of lands in *Swilland* in the county of *Suffolk*; upon the trial the following case was made for the judgment of the court: That *Henry Tampion* being seised in fee of certain lands in *Somersham* in the county of *Suffolk*, and *Mary Hammet* being seised in fee of lands in *Swilland* (being the lands in question) by indentures of lease and release of the 23d and 24th days of June 1727. in consideration of a marriage then shortly afterwards to be had between the said *Henry* and *Mary*, did release and convey unto *James Hailes* and *Samuel Dynes* and their heirs the lands in *Swilland* now in question, and the lands in *Somersham*, to the uses following, (that is to say) as to the lands in *Swilland*, to the use of the said *Mary* in fee, until the solemnization of the said then intended marriage, and as to the lands in *Somersham* to the use of the said *Henry* in fee until the solemnization of the said marriage, and from and

such appointment, to the children equally and their heirs as tenants in common, and for want of such issue, to such persons and uses as the feme shall appoint, and for want of such appointment as to the lands in C. to the heirs of the feme, and as to the lands in A. to the heirs of the Baron. Baron dies leaving one son only, the feme appoints the whole to him by her will, but if the son dies without issue, and under 21, she appoints the whole to strangers; he dies under age and without issue; this is either a good appointment, or, if it be not, is a good executory devise of the feme's resulting use in the lands in C. and therefore quacunq; via data, the heirs on the part of the feme have no title to the lands in C. But if the appointment be bad, the heir ex parte the Baron has title.

after the marriage, then as to all their lands both in *Swilland* and *Somersham* to the use of the said *Henry* for his life, and after his decease to the use of the said *Mary* for life in bar of dower; and after the decease of the survivor of them, then to the use of such child and children of the body of the said *Mary* by the said *Henry* to be begotten, and for such estate and estates, and subject to such powers, provisoes, conditions and limitations as the said *Mary*, notwithstanding her coverture, shall by any writing under her hand and seal, or by her last will and testament in writing, attested by three or more credible witnesses, limit, direct and appoint the same; and for want of such limitation, direction and appointment, to the use of all such children on the body of the said *Mary* by the said *Henry* to be begotten, and his, her and their heirs, equally as tenants in common; and for want of such issue, to the use and behoof of such person and persons, and for such estate and estates, and under such provisoes, conditions and limitations, and in such sort, manner and form, as the said *Mary Hammond*, during her said coverture, or at any other time, and as well married as sole, shall, in and by her last will and testament, or by any other writing or writings, deed or deeds, under her hand and seal attested by three or more credible witnesses, give, order, dispose, declare, limit or appoint the same or any part thereof; and as the said estates so to be appointed (if any shall happen to be) shall respectively end and determine, and for want of such gift and appointment, then as for and concerning the premises in *Swilland*, (now only in question) with the appurtenances, or so much whereof no such disposition shall be made, to the use of the right heirs of the said *Mary* for ever, and as for and concerning the lands in *Somersham*, or so much thereof, whereof no such gift or disposition shall be made, to the use of the right heirs of the said *Henry Tampion* for ever: That the said marriage soon afterwards was had, and *Henry Tampion* thereupon entered into all the lands and was seised under the settlement, and died in 1729. seised of the lands both in *Somersham* and *Swilland*, leaving the said *Mary* his wife and one only child by her, *Henry*.

That *Mary* the widow upon the death of her husband entred into all the lands both in *Somersham* and *Swilland*, and was seised thereof under the said settlement; and being so seised, by her will of the 25th of November 1733. properly attested, gave and devised unto *Henry Tampion* her son and his heirs for ever, all the lands in *Swilland* and *Somersham*; but in case her said son should die before his age of 21 years, and without issue, then she gave the said lands in *Swilland* to her brother *Joseph Clarke* and *Ann Procter* her sister, the wife of *Boycott Procter*, and to their heirs for ever, as tenants in common; and upon the like contingency she gave the lands in *Somersham* unto *Sbearcroft* and *Hailes*, and their heirs, as tenants in common.

That

That the said *Mary* having so made her will died seised of all the lands in *Swilland* and *Somersham* in 1733. leaving her son and only child *Henry* an infant.

That *Henry* the son upon the death of his mother entred into all the lands in *Swilland* and *Somersham*, and was seised thereof as the law requires, and afterwards in the year 1733. died seised thereof, under age and without issue.

That *Small* the lessor of the plaintiff is heir at law to *Mary* the mother of *Henry the son*, and heir to *Henry* the son on the part of his mother, and the defendants claim title and are in possession of the lands in *Swilland* now in question under the will of *Mary*.

After several arguments at the bar, the court gave judgment for the defendants, and were all clear of opinion that whoever had title to the lands in *Swilland*, the heir of *Henry* the son *ex parte materna* had none.

Many objections were taken to this appointment to *Clarke* and *Proctor* upon the contingency of *Henry* the son's dying without issue and under age, as not being warranted by the power under the settlement, but the whole court agreed that if it could not operate as an execution of the power under the settlement, yet it was good as an executory devise to pass all the mother's interest, and therefore they said if the lessor of the plaintiff claimed by descent as heir to the mother *Mary*, she had devised her estate away, (if she had any) and if the limitations to *Henry* and his heirs took place under the settlement for want of appointment, *Henry* the son, in that case, would take a fee by purchase, and then his heirs on the part of his father would have title, so that it was impossible that the lessor of the plaintiff as heir on the part of the mother could have any title.

But although the court held this to be a clear case against the plaintiff, and that the defendants being in possession intitled them to have judgment, yet they doubted how far their title could be maintained if they had been plaintiffs in this ejectment, or if the question had now between them and the heir on the part of the father.

This doubt arose upon the limitation in the settlement after the wife's estate for life, "To the use of such child and children on the body of the said *Mary* by the said *Henry* to be begotten, and for such estates, &c. as she should appoint"; and upon the argument for the plaintiff it was contended, that as there was issue of the marriage, the conditional appointment over to strangers was not made in strict pursuance of the power, and was therefore a void execution thereof; that all powers are to be strictly pursued; and the

only power given to the mother, in this case, was, to distribute the estate among the children, if there should happen to be more than one, in such proportions as she thought proper; that she might give an estate to one for life, to another in tail, and to a third in fee, but that she was obliged to depart with the *whole fee-simple* among them, and if there was only one (which was the case) that she must give the *whole* to that one, and had not power to limit a partial fee as she has done; this was compared to a case which frequently happens in courts of equity, where a sum of money intended as a provision for younger children is left to the distribution of a father or mother to be proportioned as they think proper, in which case it was insisted that when there is only one child, that child would in equity be intitled to the whole.

It was further insisted, that the manifest intention of this settlement appeared to be, that the children of the marriage should, at all events be provided for, after the death of the mother, and that this intention would be intirely defeated if the mother should be construed to have had a power to appoint to an only child a less estate than an absolute fee-simple, for she might then have given him an estate for years, or for a day only, and so leave him totally unprovided for; to this it was answered, that if there were more children than one it was agreed that the mother might appoint to which she pleased the whole fee-simple, in which case she would leave the rest without any provision at all, and therefore it could not be the intention of the settlement that all the children should be provided for in all events; that in this case however the mother had made a sufficient provision for the child, for *Henry* the son was by the devise to take the whole fee-simple absolutely, unless he died without issue and under 21.

It was further contended for the plaintiff, that if the power was not properly pursued, *Henry* the son in this case could not take an estate in fee by the next limitation for want of such an appointment, which is "to the use of all such children on the body of the said *Mary* by the said *Henry* to be begotten, and his, her, and their heirs equally as tenants in common; and for want of such issue, &c." for that the words in the settlement "*for want of such issue*", restrained the estate to the children, and their issue, and made it an estate-tail; that therefore, as *Henry* the son died without issue, the plaintiff had title as right heir of *Mary*, for that this was not a good will to pass any future interest by way of executory devise.

But as to these two points it was resolved by the court, first, That this was a good executory devise, as it depended upon a contingency to arise within the compass of a life then in being; and 2^{dly}, That the meaning of the words "*for want of such issue*" in the settle-

ment, was only that the limitation to the children and their heirs could only take place for want of the wife's appointment under the first power, and that the next power given to the wife could only take place for *want of issue of the marriage*; and *Burnett* Justice declared that these words did not create an estate-tail, but only made the wife's second power of appointing depend upon a contingency with a double aspect.

No opinion was given upon the question as to the validity of this appointment, as *that* could no way affect the present plaintiff, but could only be a question between the heir of the part of the father, and the devisees, for if the power was so far illegally pursued as to let *in* the next limitation to the children and their heirs for want of an appointment, then the heir *ex parte paternâ* would have title, but if it was so far well executed as to prevent the subsequent limitation from taking place, the remainder of the estate would either go over with the last limitation of the fee to *Mary*, or what is not settled in the release would be vested in her by way of resulting use as to the lands in question; in either of which cases the title would be in the devisees. The court gave judgment for the defendants, and ordered the *possea* to be delivered to them, and that the plaintiff should pay them costs of nonsuit.

N. B. *John Tampion* the eldest brother of *Henry Tampion* the father, uncle to *Henry* the son and heir at law to them both, brought an ejectment in *C. B.* for all the lands both in *Somersham* and *Swil-land*, which was tried at the *Lent* assizes at *Bury* in 1743. and by the consent of the parties a case was made upon the very same settlement and will for the opinion of Mr. Justice *Burnett*, before whom the case was argued at his chambers, and he was of opinion as to the lands in *Somersham* which moved from *Henry Tampion* the father, and whereof *Mary* could have no resulting use, that she had no power to dispose thereof, and determined that *John Tampion* the heir both of *Henry* the father and the son should recover the lands in *Somersham*; but as to the lands in *Swil-land* he was of opinion that if it was a doubt whether her appointment over was good or not, yet that as they moved from her, she had a resulting use therein upon the death of *Henry* the son without issue and under age, which she had power to dispose of, and as to those lands gave his opinion for the devisees, that they took them by way of executory devise of her resulting interest; but notwithstanding this opinion of a single judge, *John Tampion* has since brought another ejectment in *B. R.* for the lands in *Swil-land*, which was tried at *Bury summer assizes* 1746. when a case was made as above for the opinion of the court of *B. R.*

See the 2d
Vol. of these
Reports 330.
337. *Roe v.*
Dunt.

Neal, of the demise of the Duke of Athol, *versus*
Wilding & al'. B. R.

IN ejectment, after a special verdict and three solemn arguments it was adjudged by the whole court that where tenant in tail male the reversion in the crown (*anno* 5 Hen. 8.) before the *stat.* 31 & 35 Hen. 8. suffered a common recovery with single voucher, the recoveror thereby gained a *base fee* which will be determinable whenever there shall be a failure of issue male, that this *base fee* is descendible and alienable, that the issue in tail are thereby completely barred, and the ancient reversion is still in the crown, which may come into possession and take place whenever there shall be a failure of issue.

Tenant in tail of the gift of the crown, the reversion in the crown, suffers a common recovery before the 34 H. 8. he gains a *base fee*, descendible and alienable so long as there is

issue in tail, and the reversion is still in the crown. Bro. Tail 41. Cro. Car. 430. Plowd. 555. a. dit. per Manwood. 1 Leon. 85. as to remitter.

The lands in question were part of the lands which Hen. 7. granted to Sir Thomas Stanley in tail male, whereof Thomas his grandson Earl of Derby suffered the common recovery, 5 Hen. 8. and thereby gained a *base fee*, which descended to Charles Earl of Derby, who (after *stat.* 4 Jac. 1. touching the estates and controversy in the Derby family) levied a fine of the lands in question, under which the defendants claim as purchasers of the *base fee*.

The court resolved that the *stat.* 4 Jac. enacted with the consent of the parties therein mentioned, made no alteration in the *base fee*, which was then in existence; that the crown or parliament gave nothing thereby, but only by consent of the family new modelled the *base fee*, which is descendible and alienable so long as there are heirs male of the family.

The lessors of the plaintiff claim under a family settlement confirmed by parliament by the said private *stat.* 4 Jac. 1. and it was contended that by that statute these lands in Brotherton in Lancashire were made unalienable by the issue in tail; that in case of a deed, it was admitted it would have been otherwise; but the court resolved the contrary as afore is said.

It was objected that the verdict found the fine was levied *tempore* Car. 2. before the King's justices in the court at Lancaster, but it is not found who those justices were, whether they were such justices as had power to take the fine; but *per curiam*, We will presume the county palatine of Lancaster, the court will presume they were justices who had power to take the fine.

A fine is found by a verdict, to be levied before the justice of the court of

them

them to be such justices as had power by statute to take fines in the county palatine, as the contrary does not appear.

The recovery here in 5 Hen. 8. makes the difference between this case and *Murray v. Eyton*, T. Raym 338. Sir T. Jones 237. S. C. there was no recovery, only a fine by tenant in tail with reversion in the crown, after stat. 34 Hen. 8. Judgment for the defendants.

Trinity Term

24 Geo. 2. 1750.

Beck, on the demise of Hawkins *versus* Welsh. B. R.

5 B & A 458

Tenant in tail mortgages for years, becomes bankrupt and dies without suffering a common recovery, the assignee of the bankrupt shall have the estate clear of the mortgage by the stat. 21 Jac. 1. c. 19. s. 12.

EJECTMENT, verdict for the plaintiff subject to the opinion of the court upon this short case; *Thomas Grundy* being seised in fee tail of the lands in question, made a mortgage thereof to the defendant for a term of 500 years, without having suffered a recovery, and afterwards became a bankrupt, and died before the bringing this ejectment; the lessor of the plaintiff is the assignee under the commission of bankrupt, and claims title under the stat. 21 Jac. 1. c. 19. sec. 12. which enacts, "That the commissioners of bankrupt shall have power by deed inrolled to grant and sell all manors, lands, tenements or hereditaments whereof any bankrupt is, or shall be seised of any estate tail in possession, reversion or remainder, for the benefit of the creditors of such bankrupt. And that such grants and sales shall be good in law against such bankrupts, the issues of their bodies, and against every person claiming any estate, right, title or interest under such bankrupts, and against every person whatever whom such bankrupts, by common recovery or otherwise, might cut off or bar from any remainder, reversion, rent, profit, title or possibility into, or out of any the said manors, lands, tenements or hereditaments.

This

This case was twice argued at the bar, and two questions were made; 1st, Whether, if *Thomas Grundy* had suffered a recovery, it would not have let in this mortgage for 500 years?

2^{dly}, Whether the statute does not operate as a common recovery to all intents and purposes?

As to the first question it was resolved by the court clearly, that if tenant in tail makes a lease or mortgage for years, or charges the land with any other incumbrances, and afterwards suffers a common recovery, *that shall let in all the incumbrances*; and the reason is, that whatever act binds the tenant in tail himself, shall bind the recoverors, or the person or persons to whose use the recovery is suffered; for he who recovereth cannot say that *he* against whom he recovered had but an estate in tail. *Popb.* 5, 6. and the court said this is the law beyond all doubt.

But if he had suffered a recovery it would have let in the mortgage and other incumbrances.

As to the 2^d question, They held that the statute of 21 *Jac.* 1. c. 19. *f.* 12. was made for the benefit of creditors who had no specific lien upon the lands of a bankrupt, and not for any particular creditors who relied upon the title they accepted of; that tenant in tail without suffering a recovery could only affect the estate for his life, and he being now dead the mortgagee's title is at an end, and this statute never intended to put the prior incumbrancers on an estate-tail in a better case than they would otherwise have been if the statute had never been made; it would be very strange to say that this statute which was most plainly made for the general benefit of all the creditors should have an effect which is quite contradictory thereto, *viz.* to make good a defective title to a particular creditor, it is impossible the legislature could ever intend any such thing so without saying any more; though this be a new case, yet we are all clear of opinion that judgment must be for the plaintiff.

Gunn versus Mackhenry. B. R.

THE plaintiff levied a plaint in an action of debt in one of the courts of the city of *London* for goods sold, board and necessities, made an affidavit that 30 *l.* was owing to him from the defendant, and held him to bail, and declared in the city court in debt upon a *concessit solvere* according to the custom of the city.

Plaintiff declares in the city court in debt on a *concessit solvere*, the cause is removed by *ha. cor.* and he declares here in case, yet he shall not lose his bail, for it is the same cause of action.

The action being removed into this court, by *habeas corpus*, the defendant puts in bail above, and the plaintiff declares here *de novo* in an action upon the case upon several promises, proceeds to final judgment, and to a *scire facias* against the bail; and now it is objected on behalf of the bail by Mr. *Hume Campbell*, that the original

PART I.

4 B

plaint

plaint below being in an action of *debt*, and the plaintiff having declared here in *case*, has thereby lost his bail. *Sed per curiam*, This is the very same cause of action, and if the plaintiff had declared here in debt upon a *concessit so vere*, the defendant might have waged his law, which he could not have done in the city court; and we are all of opinion the bail are liable.

Chester *versus* Upsdale. B. R.

Q Whether a game-keeper to a peer be privileged from arrests.

THE defendant being arrested for a debt at the plaintiff's suit moved the court to be discharged out of custody upon common bail upon his own *affidavit* only, wherein he swears that he entred into the service of Lord Willoughby de Brooke in June last as his *game-keeper* of his manors in *Somersetshire*, and has ever since continued, and now is in his Lordship's service, and that by order of his Lordship he had been attending him in several counties in *England*, and is charged with business he has to be done for his Lordship, which he swears he cannot execute because he is detained by the arrest.

Per curiam, Before the *stat. 12 & 13 W. 3. c. 3.* the way was for persons intitled to privilege of parliament to sue for such writ; and in *Pitt's case*, *Comyns 444.* although the Judges were of opinion that he was intitled to privilege of parliament, and discharged him upon motion, yet Lord *Hardwicke* Chief Justice then expressed himself to this effect: "I desire it may be understood, that we do

Vid. Clarendon's Hist. Rebell. lib. 4. fol. 397. 410. Edit. anno 1705.

"not determine that the court is bound, in every instance of this kind that may hereafter happen, to discharge persons (who may claim privilege) upon motion, without a writ of privilege, but we hold it discretionary in the court, either to proceed by this method, or by writ, as the nature and particular circumstances of the case shall appear to induce the legal discretion of the court," And this brings us to consider, whether in the present case there is sufficient evidence laid before the court to induce us to grant this motion; and we all think there is not; for if the defendant is really and truly in the service of Lord Willoughby de Brooke, and is necessarily employed about his estates and manors, there ought to be an *affidavit* laid before us *what*, and *where* those estates are, and that his Lordship is in possession of such estate or manor, and that the defendant is *game-keeper* in such manor; we give no opinion whether this defendant is intitled to privilege of parliament or not; but by an order of the house of Peers of the 28th of June 1715. which seems to be a declaration of their privileges, we conceive that *that* order does not extend to privilege all their menial servants from arrests, but only such as are necessarily and properly employed about their estates, and about their persons; that therefore as this is the sense

of the Lords themselves of their own privileges, we ought to have proof laid before us that this defendant is necessarily and properly employed about the estate of Lord *Willoughby*; and therefore the rule to shew cause why common bail should not be accepted must be discharged. N. B. Lord *Willoughby de Brooke* sat in court while this motion was made and debated, *with his hat on*, upon the bench next to the junior Judge, and after the motion was over, stood up with his hat still on, and spoke something to the court, which I could not hear; but I heard Lord Chief Justice *Lee* tell him, (with some warmth) that he did not behave with proper decency to the court; whereupon Lord *Willoughby de Brooke* begged pardon of the court, and pulled off his hat.

Rollin *versus* Mills. B. R.

ACTION upon a foreign bill of exchange; and in order to hold the defendant to special bail, one *Peter T. of London*, merchant, maketh oath, that the defendant *Mills* is indebted to the plaintiff *Rollin* in a certain bailable sum of money by virtue of a bill of exchange indorsed by the payee to the plaintiff, as appears by the said bill and indorsement, and that *Mills* the defendant accepted the bill, but had refused payment; that the bill was protested, and though the affidavit was positive that the defendant had accepted the bill, yet the court on hearing counsel on both sides ordered common bail, because the affidavit only swears that the defendant is indebted, *as appears* by the said bill, &c. An the case of *Mansfield v. Ferguson*, Mic. 16 Geo. 2. B. R. was exactly like to this; and in *Hil. 19 Geo. 2.* a third person swore that defendant was indebted to plaintiff in 800 l. *as appeared* by an account stated under the defendant's own hand; Mr. *Henley* moved that common bail might be accepted, which was ordered accordingly on hearing the other side; and the court said that such affidavit is insufficient, when it says, "*As appears* by such a note, bill or bond, &c." and this balance of account may have been discharged for any thing this third person knows. *Vide 2 Stra. 1226.*

Bail.
What kind of affidavit shall be insufficient to hold defendant to special bail.

Ante 121,
231.

Michaelmas Term

24 Geo. 2. 1750.

Taylor *versus* Bird. B. R.

A man binds himself in a bond to leave his children 200 l. he leaves four children, and gives the eldest an estate in land, and to the other three 50 l. a-piece at 21. this is not a performance of the condition.

DE B T on a bond, defendant craves *oyer*, and sets forth the condition, which was, "That whereas a marriage is shortly to be had between *Samuel Bird* and *Mary Taylor*: Now the condition of this obligation is such, that "if the said *Samuel* shall give, bequeath or leave to the said *Mary* 200 l. for her own benefit, or, if the said *Mary* shall die before the said *Samuel*, he shall leave unto the child or children of the said *Mary* jointly 200 l. then this obligation to be void."; which being read and heard, the defendant goes on and pleads, that the said *Mary* is dead, and left four children, and that *Samuel Bird* by his will gave to the eldest son an estate in land of more than the value of 50 l. and to the other three children 50 l. a-piece to be paid to them as they should attain their respective ages of 21. To this the plaintiff demurs.

Per curiam, The plea is bad, for the giving the three children the several legacies of 50 l. a-piece to be paid at 21, and the landed estate to the eldest child, is not a performance of the condition; and there is a great difference between leaving the children 200 l. jointly, and giving them several legacies at 21, and it was intended that there should be a benefit of survivorship; and the land cannot survive, besides there is no present provision for the children, which was plainly intended to be made by the bond, therefore there must be judgment for the plaintiff.

The Innholder's Case. B. R.

ACTION of debt upon a *by-law*, "That every innholder being entred as a brother of the company, shall pay two shillings a year quarterly (to be applied to particular purposes for the benefit of the company) under the penalty of five shillings *per annum*;" the breach assigned is, that the defendant has for four years next before the 1st of September 1749. been entred a brother of the company, but has neglected to pay the two shillings *per annum* quarterly for the said four years, *per quod actio accrevit*. Objected in arrest of judgment after a verdict, that no particular days are assigned for the quarterly payments to be made; but *per totam curiam*, The declaration is very well; and *Denison J.* said it would have been good even on a demurrer. *Postea* delivered to the plaintiff.

Debt on a by-law for not paying 2 s. per ann. quarterly; the breach need not assign the days of quarterly payment. 711-6838

Dale *versus* Hall. B. R.

ACTION upon the case against a shipmaster or keelman who carries goods for hire from port to port; the plaintiff does not declare against him as a common carrier upon the custom of the realm, but the declaration is, that the defendant at the special instance of the plaintiff undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money, that the goods were delivered to the defendant on board his keel, and that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage; upon the general issue *non assumpsit*; this cause came on to be tried before Justice *Burnett*, and the plaintiff proved the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and rusted to the amount of 24^l. this was all the plaintiff's evidence.

A hoyman who undertakes to carry goods, must deliver them safe at all events, except damaged by the act of God, or by the King's enemies. 1 Salk. 18. 1 Vent. 190, 238.

Trustee: a wood
East. 28. G. 3. B. 219.

For the defendant it was insisted at the trial, that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in, that they pumped and did all they could to prevent the goods being damaged, which evidence the Judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

It was now moved for a new trial by Mr. *Clayton* and Mr. *Ford* for the plaintiff, who insisted that the evidence given for the defendant ought not to have been received.

Foster (Justice) reported, that *Burnett* (Justice) was doubtful whether the evidence given by the defendant was admissible or not, and submits *that* to the court: but if it was admissible, he is very well satisfied with the verdict.

Sir *Thomas Bootle* and Serjeant *Bootle* for the defendant, insisted that this declaration not being upon the custom of the realm, but upon a particular contract, and that the breach assigned being, that by the negligence of the defendant the goods were spoiled, that therefore *negligence* is the very *gist* of this action, and the defendant has proved there was no negligence; indeed if the declaration had been, that the defendant promised to keep safely the goods as well as to carry them safely, he must have kept them safely at all events.

Lee Chief Justice: This is a nice distinction indeed; I am of opinion that the evidence given for the defendant was not admissible; the declaration is, that the defendant undertook for *hire* to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the laws says, every thing is a negligence in a carrier or hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the *act of God, or the King's enemies*; and a promise to carry safely, is a promise to keep safely.

Wright Justice, of the same opinion.

Denison Justice: The law is very clear in this case for the plaintiff; the declaration upon the custom of the realm is the same in effect with the present declaration; in the old forms it is, that the defendant *suscepit, &c.* which shews that it is *ex contractu*; in the present case the promise to carry safely need not be proved, the law raises it, the breach is very right that he not deliver them safely, but so negligently kept them that they were spoiled.

Foster of the same opinion; and a new trial was granted.

N. Goff v. Clinkard, tried at the sittings in *London* after last *Hilary* term, before *Lee* C. Justice, was an action against a master of a ship, who undertook to carry goods from *London* to *Amsterdam*; the breach assigned was, that a puncheon of rum was staved and lost to the plaintiff's damage; this was proved to be done by the defendant's servants in letting it down into the hold of the ship;
and

and though the defendant proved it was endeavoured to be let down into the hold with all possible care, yet by accident it was staved; notwithstanding this, the jury gave a verdict for the plaintiff agreeable to the directions of the Chief Justice. N. This case was cited by * Mr. Clayton in the case above.

* Lord Chief Justice of the

C. B. in Ireland at the time of publishing this book.

Rex *versus* The Borough of Midhurst. B. R.

MOTION for a *mandamus* to the lord of the manor of the borough of *Midhurst* and to the steward, to hold a court, and to the homage to attend that court and present certain conveyances of burgage tenements, which when presented will intitle the purchasers to vote for members of parliament and to other privileges there, which, it appears by affidavits, had been tendered to the homage, and rejected by them at the last annual court in *August* last.

Mandamus to the steward of the manor of *Midhurst* and to the homage to hold a court, and present certain conveyances to purchasers of burgage tenements, whereby they are intitled to be sworn in burgesses of the corporation, and to vote for members of parliament.

The principal objection made at the bar against a *mandamus* is, that the homage, in this case, are not *ministerial*, but *judicial* officers, and that it appears to the court they have already exercised their judgment, and determined the conveyances tendred to them to be fraudulent, and therefore refused to present the same at the last court.

Lee Chief Justice: It appears to the court that this is an ancient borough consisting of bailiff and burgesses, that these persons as tenants of the manor have a right by purchase of descent to become burgesses, and are intitled to vote for members of parliament, and for the bailiff who is the presiding officer at elections, that a purchaser cannot exercise this right of voting, before his purchase deed be presented by the homage at a court to be holden for that purpose before the lord of the manor, or his steward, that these conveyances have been duly executed and tendred to the homage, and that the homage rejected the same, looking upon them to be fraudulent.

I am of opinion that the purchasers when they tendered the conveyances had *jus in rem*, viz. to be admitted burgesses, and to THE PRIVILEGE OF VOTING, which, as Lord *Holt* said in *Asbby* and *White*, is not *minima in lege*, but a NOBLE PRIVILEGE; and I think it would be a shame to the law to send these purchasers to seek remedy in another court under a pretence that their purchase deeds are fraudulent; that is a matter which we cannot take notice of, or try at present, they have no remedy but by a *mandamus*, and this being of a public concern, this court must grant it, and if the conveyances are not good in law, that matter may be returned. I think the homagers are *ministerial* in this case; this is a particular authority lodged in

in certain persons by the custom of the manor respecting the *public concern* of the nation, and therefore a *mandamus* must go the homage to present the conveyances, and to the steward to hold a court, admit, and swear *in* these purchasers, burgesses of the town.

Wright Justice : I am of the same opinion, the homage has no right to say whether these conveyances be good or not, they ought to present them, and there is no other remedy unless this writ goes, no other remedy has been so much as hinted at the bar; *mandamus's* were introduced to assist in matters of right concerning the *public*, and the maxim *est boni judicis ampliare jurisdictionem* is thereby made good; the case of *Clithero*, *Comb.* 239. is in point, but if this case was quite new, I think a *mandamus* ought to go. And one writ will do to both the *jurats* and *steward*, and to be returned by them, *reddendo singula singulis*.

Denison Justice of the same opinion: I am satisfied that the homage in these presentments do not act *judicially*, all they have to do, is to declare in court, that the land which was once the land of *A.* is now *B.'s* and is very like livery of seisin, which is no more than making a matter public.

Foster Justice of the same opinion: It is said these homagers are upon their oath, and so is every mayor of a corporation, and yet he is a *ministerial* officer in many cases; the homagers are finable by the steward of the manor; if so, surely this court can send a *mandamus* to them, and to deny the writ, would be to say there is a right without a remedy.

Rule absolute for one or more writs of *mandamus* at the pleasure of the prosecutors.

Park *versus* Yerbury, bail for Richard Snow. B. R.

Declaration in debt on a recognizance against bail, must set out for whom defendant was bail, and in what sum.

DEBT upon a recognizance of bail; defendant demurs, and assigns for cause that it does not appear by the declaration at whose suit the defendant became bail for *Snow*, nor in what sum of money.

To this it was answered, that the entries of recognizances are not in any particular sum. *Lillies Ent.* 521. 6 *Mod.* 159. *Sed per curiam* 6 *Mod.* is very different from this; for there never was a declaration like this; it ought to have set out that the defendant became bail for such a person in a certain plea of debt of so much money, for which the plaintiff exhibited his bill, &c. Judgment for the defendant, unless cause before the end of the term.

Blinkhorn *versus* Feast. In Chancery, 24 Oct. 1750.

A Man makes his will, and appoints two infants his joint executors, and gives to each of them a separate specific legacy of his personal estate, *viz.* To each of them a particular mortgage, and makes no disposition of the *residuum*; and the question now upon the hearing of the cause is, whether there should be a resulting trust as to the residue for the benefit of the testator's next of kin, or whether it should go to the executors.

When there are two executors and unequal legacies are given them, or a legacy to one and nothing to the other, they shall have the *residuum* undisposed of.

Lord Chancellor decreed that it must in this case go to the executors, and not to the next of kin; for the testator by giving them specific legacies of unequal value intended so much to prefer *one* before the *other*; and *2^{dly}*, The testator might intend that they should take some part of his estate in severalty as tenants in common, and the residue as jointenants, which in this case they do. And the Lord Chancellor cited a case before himself, where there were two executors, and a legacy given to *one*, but nothing to the *other*, and the residue being undisposed of, he decreed it to the executors jointly and equally; and said the testator, in that case, only intended to prefer *one* executor to the *other*, to the amount of the legacy he had given to that *one*.

Hilary Term

24 Geo. 2. 1750.

The Right Honourable the Earl of Chesterfield and others, Executors of the Honourable John Spencer, Esq; *versus* Sir Abraham Jansen, Knt. In Chancery, before Lord Hardwicke, assisted by Lord Chief Justice Lee, his Honour the Master of the Rolls, Sir John Strange, Lord Chief Justice Willes, and Mr. Justice Burnett.

12 Mslw 490.

Fraud, imposition, and catching bargain, what shall, or shall not be deemed such.
Usurious contract, what constitutes it.

IN May 1738. Mr. *Spencer* was 30 years of age, had an estate of 7000*l.* per ann. of his own, and another large estate whereof he was tenant for life, and having contracted debts was very much pressed for money to pay them off; the *Dutchess of Marlborough*, from whom Mr. *Spencer* had very great expectations, was then 78 years of age; Mr. *Spencer* by his agent sent a proposal to market to borrow 5000*l.* to pay 10000*l.* for it within a month after the death of the *Dutchess*, in case he should survive her; the defendant listened to the proposal, but at first hesitated; however, at last, came into the bargain and advanced to Mr. *Spencer* 5000*l.* who gave a bond to pay the defendant 10000*l.* if Mr. *Spencer* should survive the *Dutchess*, which bond was made by Mr. *Spencer's* own agent.

The *Dutchess* died in October 1744. about six years and five months after this bargain, whereupon Mr. *Spencer* sent for the defendant and expressed himself sorry that he could not then immediately pay him the 10000*l.* and of his own free accord offered to give, and actually did give the defendant a bond in the penalty of 20000*l.* and a warrant of attorney to confess a judgment for the 10000*l.* and interest, and thereupon he defendant gave him up his first bond; Mr. *Spencer* afterwards paid 2000*l.* in part, and died in June 1746. about one year and eight months after the *Dutchess*.

The defendant having sued out a *scire facias* upon the judgment against the plaintiffs, this bill is brought to set aside the contract as
usurious

usurious and illegal, or against conscience; and for an injunction, upon payment to the defendant of what remains due to him of his 5000 *l.* and interest.

The defendant in his answer admits all the facts above, and further says, that in his conscience he thinks the bargain was a fair one, for that Mr. *Spencer* was very infirm in his constitution; and in truth did not long survive the *Dutchess*, so that the defendant ran a great hazard of losing the whole 5000 *l.*

It appears from the proofs read in the cause for the plaintiff, that it was hawked about, that Mr. *Spencer* wanted to borrow 5000 *l.* to pay double for it upon the death of the *Dutchess* if he survived her, and *Backwell* (a gamester) the witness told Mr. *Spencer* that he had found out a man of honour and fortune proper to be applied to, who, if he should not be willing to come into the bargain, would keep the matter secret, so that there would be no danger of its coming to the ears of the *Dutchess*; upon this, *Backwell* applied to the defendant on behalf of Mr. *Spencer*, who, he swears, at first, declined the bargain, but said, he would consider of it; afterwards he agreed to it, and advanced the money upon the terms above; it is also proved for plaintiff that Mr. *Spencer* was of a very strong constitution in 1738.

From the proofs read for the defendant it appears, that Lord *Mumford* refused to advance the money upon the like terms proposed to him, because he looked upon Mr. *Spencer*'s life to be a bad one; several witnesses prove him of a broken constitution, and the *Dutchess* of a strong one for a person of her years; it is also proved that in 1738. Mr. *Spencer* was indebted to several persons to the amount of 20000 *l.* was much pressed for money, and that after he had got the 5000 *l.* of the defendant he applied the money to pay off tradesmen.

This case was solemnly debated in *Trinity* term last by Mr. *Noel*, Mr. *Clarke*, Mr. *Wilbraham* and Mr. *Crowle* for the plaintiffs, and by Mr. *Attorney* and Mr. *Solicitor General* for the defendant.

It was argued for the plaintiffs, 1st, That this was an usurious contract, and could not have stood, even at law.

2^{dly}, That if it was not strictly an usurious contract, yet under the circumstances of the case, it is a bargain against conscience, and ought to be set aside in a court of equity, as being an unreasonable advantage made of a necessitous man.

And

And 3dly, That what Mr. *Spencer* did after the death of the *Dutchess*, shall not make that bargain good, which in conscience ought not to stand, as being inconsistent with the policy of the kingdom.

Mr. Attorney
General
Rider.

In answer to the first point it was insisted for the defendant, that to make a contract usurious there must be a loan of money to be repaid in all events with more than lawful interest, that the 5000*l.* was not to be repaid in all events, but only in case Mr. *Spencer* should survive the *Dutchess*; so that the defendant ran the hazard of losing the whole. *Cro. Eliz.* 741. *Cro Jac.* 109. And the true reason why a *bottomree bond* is not with the statute of usury, is not upon account of trade, but because the party runs a risque of losing all.

2dly, It was argued for the defendant, that as this was not an usurious contract, so neither was it a bargain against conscience fit for this court to interpose in; that the manner of obtaining the contract was very fair on the part of the defendant, who never has made it his business to deal in this manner before; that Mr. *Spencer* sought him to come into the contract, and not be Mr. *Spencer*, who was wholly a stranger to him, and this the defendant swears, and it is also proved, that it is not so much as charged or hinted at, that Mr. *Spencer* was a weak young man, or in the least liable to be imposed upon, and though he might have run out a little; yet he had an estate in possession of above 7000*l. per ann.* and that he paid his tradesmen with the 5000*l.* was a circumstance in the defendant's favour.

And 3dly, It was insisted upon for the defendant by Mr. *Attorney*, that supposing this was originally a bad contract (which he absolutely denied) yet Mr. *Spencer* by giving his bond and judgment after the death of the *Dutchess*, and paying 2000*l.* in part, freely and voluntarily has made the bargain good, and shews most clearly that Mr. *Spencer* looked upon the contract as very fair; and that there was not the least fraud, circumvention, or imposition in it.

Mr. Solicitor argued next for the defendant, and (in the judgment of all who heard that great man,) made one of the most learned and elegant arguments that ever was heard in the hall. I am conscious to myself it is impossible for me to do the great orator justice, unless I could write down every word he spoke, and therefore I must tell the reader that what I here report is no more than a rough sketch of the heads or substance of his argument.

Mr. Murray. Mr Solicitor General: Three questions are made; 1st, Whether the bond as it stood originally was not void at law by the statute of usury?

2d, Whether this court cannot set the bargain aside, as being against conscience.

And 3dly, If the bond be neither against law nor against conscience, yet whether this court ought not to set it aside on the foot of policy.

I shall first premise that this is as fair, as honest, and as honourable a contract as can be made, and will be most plainly shewn to be so, by considering,

1st, The circumstances, character and situation in life of the obligor; and

2dly, Of the obligee.

3dly, The manner in which the contract was carried on and concluded.

4thly, The fairness of the price.

5thly, The opinion the obligor himself had of this transaction.

1st, *The circumstances, character and situation in life of the obligor*: He was 30 years of age, of good understanding, not liable to be imposed upon, not a young heir, had no father, was himself a father, was in no state of disobedience with any relation, never gamed to excess, or lost at gaming 300*l.* in all his life, his fortune in lands was 5000*l.* per ann. settled upon his marriage, he had 2000*l.* per ann. and the interest of 10000*l.* under the *Duke of Marlborough's* will, a leasehold of 120*l.* per ann. - 520*l.* per ann. for his life, besides plate and furniture agreeable to his fortune, and had great expectations from the *Dutchess of Marlborough*, whose favourite he was; when he wanted and had this 5000*l.* he owed to tradesmen 20000*l.* Justice required him to pay his debts, nay prudence required it, for fear their clamors should reach the ears of the *Dutchess*; and if he had advised with his best friends how to raise money, they must have told him this was the best way of doing it; suppose at the time of making this contract it had been settled and known that such a contract was bad, and that this court would have set it aside, *Mr. Spencer* must have been ruined.

2dly, *The circumstances and character of the defendant*: He is a man of fortune, upon whose character there is not the least charge or imputation in the bill; this is the only bargain of the kind he ever made; it might have been material for the plaintiffs to have made it appear that this was his usual way of traffic; he was quite

a stranger to Mr. *Spencer*, nor ever kept him company; and shall the property of a fair and honest man be taken from him, because there are such persons in the world as devourers of young heirs?

3dly, *The manner in which the bargain was carried on and concluded*, was extremely fair: Mr. *Spencer* himself sent the proposal to the defendant, and fixed his own terms, which the defendant at first refused, as thinking them disadvantageous to him, for both the *Dutchess* and Mr. *Spencer* might have lived so long, that although she had died first, the defendant might really have lost by the bargain.

4thly, *The fairness of the price*. The bargain supposes the *Dutchess* must die first, or it would be a most foolish one indeed on the side of the defendant; and in truth some of the witnesses seem to think he made a foolish bargain; Mr. *Spencer* was certainly in a bad state of health, and only survived the *Dutchess* about 20 months, he died of a broken constitution, she of old age, compute the price on the event; they say on the other side the defendant might have insured Mr. *Spencer's* life for 5*l.* per cent. but this is only said by one witness, and that is of a life of 30 in perfect health; an exact computation has been made, that if the 5000*l.* had been put out at legal interest, and the interest made principal every six months, it would, in the time from the advancing thereof to Mr. *Spencer*, till the death of the *Dutchess*, have accumulated to 9663*l.* There must be some inequality in every bargain, and to make a bargain void by the *Roman* law, the price must not be half the value of the thing sold.

5thly, *the opinion Mr. Spencer himself had of this transaction* is, that it was a fair and honest bargain, he takes every proper step of his own accord to carry it into execution upon the death of the *Dutchess*; he writes to Mr. *Jansen* to desire him to prepare a bond and judgment, executes them, pays 1000*l.* at one time and 1000*l.* at another, and there is not the least suggestion or proof that the defendant ever threatened to distress Mr. *Spencer*.

So that this bargain, considered in every view, appears to be a fair and honest bargain; having premised thus much, I shall now consider the 1st question, namely,

Whether the bond as it stood originally, was void at law by the statute of usury.

Antiently it was against the canon law to take any premium whatever for the loan of money, as being against the law of God, and our common law followed it. Usury is the hire of money for a certain price

price to be repaid again in all events, and if the price given for the hire exceeds what the statute allows, the security is void; the present case is a bargain upon a hazard, not a loan of money to be repaid in all events, and is no more within the *statute of usury*, than a variety of other contingent and hazardous bargains, as *bottomree bonds*, *discounting notes and bills of exchange*, *buying up securities at under value*, *wager at odds*, *insurance interest or no interest*, and many others; but if in truth the real substance of a contract be for a sum of money lent to be repaid with higher interest than the statute allows, no shift can take it out of the statute, no contrivance can keep it from being *usurious*; as therefore this was not a loan of money to be repaid at all events, it is impossible it can be a *usurious contract*.

As to the 2d question, *Whether this is not a bargain against conscience*; there is not the least charge or proof that the defendant has been guilty of any misbehaviour, fraud or imposition whatever; but then it is said,

3dly, That although this bargain may be good both in law and conscience, yet this court ought to set it aside on the foot of *politics*. To this I answer, that this court never exercises any *legislative authority*; if a contract be good both in law and conscience, this court cannot set it aside; what were all the hazardous stock jobbings in *Change Alley*? there was a statute made to prevent them, there was a statute in *Q. Ann's* time to prevent laying wagers on *politics*; *bets at dice*, or other *fair gaming*, could not be set aside but by the legislature; shares of prizes might have been sold by sailors before the late statute to prevent it. *If the courts in Westminster-hall should take upon them to exercise a legislative power, the property of mankind would be most precarious and uncertain, which is the greatest misery that can befall any country; set me a mark upon property that I may know when I do wrong.* It is good policy not to suffer trustees to purchase of their wards, their situation implies a presumption of imposition; in cases of bonds to lewd and common women, *presumption* is against them, but *that* may be taken off if there be proof the woman was only a prostitute to the man who gave the bond, and the court would confirm such bond. In cases of marriage-brochage bonds, private agreements between a father and son before the son's marriage, giving securities to pay money for procuring of offices, it is the *misbehaviour* of the party that makes the contracts void, but if the king gives a man leave to sell an office, the *misbehaviour* is taken off; so an attorney's taking a gratuity more than his just fees, pending the cause, is a *misbehaviour*, but not *so*, after the cause is ended. It is very dangerous to lay down general rules, (which are too often to be met with in the books,) when it is impossible the court, when they made such a decree, could ever intend to lay down such a general rules. The case of *Akins v. Fare*, was a bond given

given by a *filiifamilias* that she would marry, &c. the court set that aside upon the foot of *fraud* and *imposition*; but bargains with *filiifamilias* are not in every case void or to be condemned, they may buy books, pay debts for meat and drink, &c. This court has never said that every *post obit* bond is void. In every bargain there must be a prospect of *gain* on one side; *gain* is the great spur to industry; the reasoning in *Batty v. Lloyd* has never been contradicted, where my Lord Keeper says, "One that is necessitous must
 " sell cheaper than those who are not so; if I had a mind to buy of
 " a rich man a piece of ground that lay near mine for my convenience, he would ask me almost twice the value, so where people are constrained to sell, they must not look for the fullest price, &c.

It is impossible to prevent mankind from living above their income; and if it could be done, I cannot see what benefit it would be to the public; shall property be locked up and for ever intailed in the same families? if it could be done there would be an end of trade and industry; in short, men in necessity will have money if it can be attained by any means, and if they cannot get it of honest men they will run to knaves and sharpers, who will run any risk; to conclude; as this bargain is neither against the statute of usury nor against conscience, I can see no foundation for setting it aside, or relieving against the bond and judgment.

The Lord Chancellor and the Lords the Judges took time till this term to consider, when they gave judgment *seriatim*.

Burnett Justice: I am of opinion that this is not an *usurious contract*. The old notion of *usury* is now at an end, and it is now well known that usury within the statute is taking a higher interest for the loan of money to be repaid in all events than the statute allows; this case is a contract upon a *hazard* that the defendant may never have any principal or interest at all, and is like the case of a *bottomry* bond; one of the first cases whereof is in *Cro. Jac.* 209. wherein the court determined it not to be within the *statute of usury*, because of the real *hazard* there was of losing the whole money.

- ¹ Brownl 108.
- ² Keb. 324.
- ³ Cro. Eliz. 27.
- ⁴ Noy 151.
- ⁵ Lev. 7.
- ⁶ Leon. 208.
- ⁷ Rep. 69, 70.
- ⁸ And 15.
- ⁹ Moor 397, 8.
- ¹⁰ Carth. 67.
- ¹¹ Sid. 27.
- ¹² Comb. 125.
- ¹³ Show. 8.
- ¹⁴ Cro. Eliz.
- ¹⁵ 741, 642.
- ¹⁶ Cro Jac. 507.
- ¹⁷ Lu.w. 470.

But it was objected that *bottomry* bonds were held to be good in favour of trade; I answer that the true reason why the court holds them good is, because they are not against the *statute*, for how can a man be said to take a greater sum for the forbearance of payment of a sum of money, when by a *hazard* he runs, he may be intitled to neither *principal nor interest*; indeed a colourable *bottomry* bond may be within *statute* as much as any other, as appears by *Hardres* 418.

I give no opinion that this bargain is or is not against conscience, but think this court is not warranted by *precedents* to set it aside upon payment of 5000 *l.* and interest. If this had been the case of a young heir it might have had another consideration; although it might be too hard in every case totally to prevent young heirs from borrowing of money, yet on the other hand, if this court was to permit advantage to be taken of their wants and necessities, it would be of the utmost ill consequence, it would be supplying them with means to pursue their debaucheries; avarice on one hand and craving appetite on the other are two of the worst things that can draw people together; the supplying young heirs with money for lucre is a growing evil which this court by degrees has rightly gone further and further to relieve against. In the case of *Hill and Nott*, Lord *Nottingham* relieved upon no other footing than that it was against conscience; Lord *North* reversed the decree, because there was no evidence of *fraud* or *imposition*; but Lord *Jeffereys* affirmed Lord *Nottingham's* decree.

2 Cha. Ca.
136, 137.
2 Vern. 14.
1 Wms 310.

Curwen v. Milner, June 19, 1731. before Lord *King*; one married the daughter of a rich old man, borrowed 500 *l.* to pay 1000 *l.* if he survived his father-in-law; Lord *King* relieved on paying the 500 *l.* and interest; he said if it had been a new case he would not have relieved, but thought himself bound by precedents, and particularly by *Berny v. Pitt*, 2 Vern. 14.

The case now before us is not like any of the cases cited: The borrower is not a young heir, is under no parental government, is in very rich circumstances, the terms of the bargain are of his own proposing, and the event shews the great *hazard* the defendant ran to lose all: if this court should lay it down as a general rule, that in no case whatever a young heir shall borrow money, a young heir who has a cruel and avaritious father, might starve in a *desart* with the land of *Canaan* in his view, but contracts with them must be honest and fair, not against *conscience*, or founded in *fraud* or *imposition*; but there is no occasion to give any opinion upon this second point.

Because Mr. *Spencer* has confirmed the bargain after the death of the Dutchess, in the most free and voluntary manner, when he could be under no fear or constraint whatever, and is like *Cole v. Gibbons*, 3 Will. 250.

The Master of the *Rolls*: As to the first question, I concur with the learned and Reverend Judge who has already given his opinion, that this is not an usurious contract, two things must be, to make an usurious contract, the payment of money at a day on all events, and a taking of more than lawful interest; here was no certain time

PART I.

4 F

of

given by a *filiifamilias* that she would marry, &c. the court set that aside upon the foot of *fraud* and *imposition*; but bargains with *filiifamilias* are not in every case void or to be condemned, they may buy books, pay debts for meat and drink, &c. This court has never said that every *post obit* bond is void. In every bargain there must be a prospect of *gain* on one side; *gain* is the great spur to industry; the reasoning in *Batty v. Lloyd* has never been contradicted, where my Lord Keeper says, "One that is necessitous must
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It is impossible to prevent mankind from living above their income; and if it could be done, I cannot see what benefit it would be to the public; shall property be locked up and for ever intailed in the same families? if it could be done there would be an end of trade and industry; in short, men in necessity will have money if it can be attained by any means, and if they cannot get it of honest men they will run to knaves and sharpers, who will run any risk; to conclude; as this bargain is neither against the statute of usury nor against conscience, I can see no foundation for setting it aside, or relieving against the bond and judgment.

The Lord Chancellor and the Lords the Judges took time till this term to consider, when they gave judgment *seriatim*.

Burnett Justice: I am of opinion that this is not an *usurious contract*. The old notion of *usury* is now at an end, and it is now well known that usury within the statute is taking a higher interest for the loan of money to be repaid in all events than the statute allows; this case is a contract upon a *hazard* that the defendant may never have any principal or interest at all, and is like the case of a *bottomry* bond; one of the first cases whereof is in *Cro. Jac.* 209. wherein the court determined it not to be within the statute of usury, because of the real *hazard* there was of losing the whole money.

1 Brownl 108.
 3 Keb. 324.
 Cro. Eliz. 27.
 Noy 151.
 2 Lev. 7.
 4 Leon. 208.
 5 Rep. 69, 70.
 2 And 15.
 Moor 397, 8.
 Carth. 67.
 1 Sid. 27.
 Comb. 125.
 1 Show. 8.
 Cro. Eliz.
 741, 642.
 Cro Jac. 507.
 1 Lu.w. 470.

But it was objected that *bottomry* bonds were held to be good in favour of trade; I answer that the true reason why the court holds them good is, because they are not against the statute, for how can a man be said to take a greater sum for the forbearance of payment of a sum of money, when by a *hazard* he runs, he may be intitled to neither *principal* nor *interest*; indeed a colourable *bottomry* bond may be within statute as much as any other, as appears by *Hardres* 418.

I give no opinion that this bargain is or is not against conscience, but think this court is not warranted by *precedents* to set it aside upon payment of 5000 *l.* and interest. If this had been the case of a young heir it might have had another consideration; although it might be too hard in every case totally to prevent young heirs from borrowing of money, yet on the other hand, if this court was to permit advantage to be taken of their wants and necessities, it would be of the utmost ill consequence, it would be supplying them with means to pursue their debaucheries; avarice on one hand and craving appetite on the other are two of the worst things that can draw people together; the supplying young heirs with money for lucre is a growing evil which this court by degrees has rightly gone further and further to relieve against. In the case of *Hill and Nott*, Lord *Nottingham* relieved upon no other footing than that it was against conscience; Lord *North* reversed the decree, because there was no evidence of *fraud* or *imposition*; but Lord *Jeffereys* affirmed Lord *Nottingham's* decree.

2 Cha. Ca.
136, 137.
2 Vern. 14.
1 Wms 310.

Curwen v. Milner, June 19, 1731. before Lord *King*; one married the daughter of a rich old man, borrowed 500 *l.* to pay 1000 *l.* if he survived his father-in-law; Lord *King* relieved on paying the 500 *l.* and interest; he said if it had been a new case he would not have relieved, but thought himself bound by precedents, and particularly by *Berny v. Pitt*, 2 *Vern.* 14.

The case now before us is not like any of the cases cited: The borrower is not a young heir, is under no parental government, is in very rich circumstances, the terms of the bargain are of his own proposing, and the event shews the great *bazard* the defendant ran to lose all: if this court should lay it down as a general rule, that in no case whatever a young heir shall borrow money, a young heir who has a cruel and avaritious father, might starve in a *desart* with the land of *Canaan* in his view, but contracts with them must be honest and fair, not against *conscience*, or founded in *fraud* or *imposition*; but there is no occasion to give any opinion upon this second point.

Because Mr. *Spencer* has confirmed the bargain after the death of the Dutchess, in the most free and voluntary manner, when he could be under no fear or constraint whatever, and is like *Cole v. Gibbons*, 3 *Will.* 250.

The Master of the *Rolls*: As to the first question, I concur with the learned and Reverend Judge who has already given his opinion, that this is not an usurious contract, two things must be, to make an usurious contract, the payment of money at a day on all events, and a taking of more than lawful interest; here was no certain time

N. Usury
cannot be
pleaded at
law to a sci.
fa. on a judg-
ment as this is.
2 Stra. 1043.

of payment, but the whole was at *bazard*; but if in truth this had really been a borrowing of the 5000 *l.* to be repaid with an unlawful interest at a certain day, and had only been put in this shape to avoid the statute, this court, or a jury, would have made it void.

2d, Admitting the bond good at law, whether the plaintiffs are not relievable upon the nature of the contract; I offer nothing upon this head by way of judgment, but think it proper to declare that I heartily concur with those determinations which have been in this court in cases of young heirs, and do not mean to lessen the force of any of them; but here the defendant does not appear to be guilty of the least fraud, the bargain was proposed by Mr. *Spencer*, was at first refused, and had been so, by others; I declare I have not the least jealousy or suspicion of any thing unfair on the defendant's part; but I give give no opinion upon this 2d point;

Because 3dly, Mr. *Spencer* has himself by his own subsequent acts, after the death of the *Dutchess*, most freely and voluntarily, without the least pressing or ungentle behaviour on the defendant's part, declared that the bargain was fair and honest, and this most deliberately, for the 2d bond and judgment were not executed till two months after the death of the *Dutchess*.

Post obits are not to be favoured, but this is a very particular case; I am far from blaming the plaintiffs for submitting the case to this court, being trustees for an infant.

I am of opinion the plaintiffs are not intitled to be relieved but upon paying of what remains due of the 10000 *l.* and interest.

Lee Chief Justice: I concur with his Honour and my brother *Burnett* as to the first point, that this is not an usurious contract for the reasons they have given.

As to the 2d point, I think it is well worth the while of courts of equity to consider whether they will not interpose in these bargains of *bazard*, and paying two for one; this court has always used the utmost sagacity, to discover fraud and imposition upon young heirs, to prevent the trade of biting and cheating them. I speak thus generally because I think what Mr. *Spencer* himself has done, since the death of the *Dutchess*, has prevented the court from determining on this point.

Domat 136,
137, 138.

For supposing the original contract attended with such circumstances as might have induced the court to interpose, yet what Mr. *Spencer* has since done, has made it good; and the case in 3 *Wms.* 290. seems to me to be a stronger case than this.

Lord

Lord Chancellor *Hardwicke*: If I could have foreseen the point upon which the judgment of the court turns, I would have saved the learned Judges the trouble of giving me their assistance.

The first point is a mere question of law, and is just the same as if the whole matter had been disclosed by special pleading at law; if I had differed with the Judges in this point, yet, as it is a legal question, I should have thought myself bound by their opinion, being a matter within their province, but I have no doubt at all, and concur with them, that this is not an *usurious contract*, but a wager of *hazard* not within the statute; to make a contract *usurious* there must be a *loan* to be repaid at all events with higher interest than the *statute* permits.

Bottomry bonds are held good, not because they are for the benefit of trade, but because the *whole* is at *hazard*; if the contingency goes only to the *interest* and not to the *principal* it's *usury*. Courts regard the *substance* and not the *mere words* of contracts; *loans* on a fair contingency to risk the *whole* money are not within the *statute*; a man may purchase an *annuity* as low as possible, but if the treaty be about *borrowing* and *lending*, and the *annuity* only *colourable*, the contract may be *usurious* however disguised.

As to the 2d point, Whether the plaintiffs are to be relieved upon any head of equity?

This court has undoubted jurisdiction to relieve in every case of fraud; if a bargain be *such* as no man in his senses would make, or as no honest man would come into, *there* the fraud would be apparent, and of such bargains the law courts have said they are unjust, as in 1 *Lew.* 111. *Jones v. Morgan*, in an *assumpsit* to pay for a horse one barley corn *per* nail, and double every nail, and avers that there were 32 nails in the shoes of the horse, which doubling every nail came to 500 quarters of barley; and at the trial before *Hide* at *Hereford* he directed the jury to give no more than the real value of the horse in damages, being 8*l.* and they did so, very rightly.

Knowingly or *advisedly* to take advantage of a man's *necessity* is equally bad as to take advantage of his *weakness* or *ignorance*. It may seem a little odd that a third person, no party to the contract, should be relieved; yet in cases of *marriage-brocage* bonds the court relieves, though neither of the persons are parties to the contract. So where one compounds with his creditors provided they all execute a deed in such a time, and to induce one to come in, he privately secures to him a larger composition; the others may be relieved against such underhand bargain. So in recommending persons to places and offices. All contracts must be *bonâ fide*, there must be

no *malus dolus*, contracts with young heirs and reversioners are generally compounded of the topics of fraud presumed or implied, from weakness and necessity on one side, avarice and imposition on the other; in the present case there is no fraud either implied or apparent in the defendant; and I really believe Sir *Abraham Jansen* thought he was doing a fair thing when he made the bargain.

But it is insisted, here was *necessity* (as hawking about) on one hand, and avarice of two for one on the other, and a deceit upon the *Dutchess* who was in *loco parentis*. To this it may be answered that there are circumstances in the case very strong to take off this objection; if it was necessary to give any opinion upon this point, I should be more particular.

I would not have it by any means understood, that if this was the case of a person, whose whole dependance was upon a father or relation, that such a bargain as this could stand; the *Roman senate* restrained the son from running in debt by the *Senatus Consultum Macedonian*.

It has been said at the bar that *this*, would be for this court to assume a *legislative authority*; I disclaim any such power, but yet shall never be afraid of following the determinations of my predecessors.

I have said thus much, that it may not be rumoured about that by what we have done to day we have shaken former decrees touching young heirs, reversioners, &c.

Upon the 3d point the judgment of the court depends; and I am of opinion that in case of a bargain subject to equitable objections, a person by a future agreement made freely, upon sufficient information, without compulsion, and under no circumstances of distress or necessity, may bar himself of all equitable objections against the original bargain; in the present case when the *Dutchess* was dead, Mr. *Spencer's* necessity was at an end, little more than a third of his yearly income would then pay off the 10000 *l.* he, of his own free will, lends for the defendant, gives him a fresh security, pays part, and is sorry he cannot pay the whole; he was under no restraint, no fear from any relation; this is a stronger case than *Cole* and *Gibbens*. Plaintiffs must be relieved only against the penalty upon paying what remains due to the defendant of the 10000 *l.* and interest, but the defendant must have no costs, this being a case not to be favoured.

Lord Chief Justice *Willes* is indisposed, but has written me a letter, wherein he acquaints me that he is of the same opinion with the court upon all the points,

Hilary

Hilary Term

24 Geo. 2. 1750.

Peirce *versus* — B. R.

THIS cause was tried in *Hilary vacation*, and a verdict for the plaintiff; the defendant rendered himself in discharge of his bail the 2d day of April, the plaintiff might have signed final judgment in *Easter* term after the trial, but did not sign it until *Trinity term*, and afterwards in *Michaelmas term*, charged the defendant in execution; and now it was moved that the defendant might have a *superfedeas* to discharge him out of prison, because the plaintiff (as was alledged) ought to have proceeded to final judgment in *Easter* term next after the trial, and to have charged the defendant in execution in *Trinity* term following. *Sed per curiam*, There is no colour for granting the motion, for the defendant did not render himself till after the trial, and though the plaintiff might have signed final judgment in *Easter* term, yet he might have good reason for not doing it; but however that be, the rule of court does not oblige him to proceed to the final judgment the next term after the trial, and therefore we will not grant a *superfedeas*.

Verdict for plaintiff in Hilary vacation, defendant renders himself 2 April, final judgment in Trinity term, defendant charged in execution in Michaelmas term, this is regular, and defendant is not intitled to a *superfedeas*. Rule 2 Geo.

Herbert *versus* Ashburner. B. R.

RULE to shew cause why the defendant should not have liberty to inspect the books of the sessions of the corporation of *Kendale*; it was objected that the party is not intitled to see the books unless he can shew to the court by affidavit that they contain matters relating to the thing in question; which is, whether the *park lands* be within the town or corporation of *Kendale*. *Sed per curiam*, These are public books which every body has a right to see; and the rule was made absolute without hearing the other side.

Every body has a right to inspect books of the sessions.

Wheeler an Attorney's Case. B. R.

Privilege of
an attorney.

HE was arrested by a *latitat*; and it was held *per totam curiam*, That it is a motion of course to discharge him out of custody on filing *common bail*.

Easter Term

24 Geo. 2. 1751.

Mayor and Commonalty of Bristol *versus* Proctor. B. R.

Venue chan-
ged to the
next county
for want of a
fair trial in
the proper
county.

Salk 670.

MR Norton moved on behalf of the defendant to change the *venue* from the city of *Bristol* into the county of *Somerset*, alledging that the sheriff and coroners of *Bristol* are chosen by the *city*, and therefore there could not be a *fair trial*; *Per curiam*, This is not a motion of course, there must be an *affidavit* laid before us that the sheriff of *Bristol* is an officer of the *corporation*, afterwards such an *affidavit* was produced and a rule was made to shew cause; Mr. *Probyn* shewed for cause that the matter in question did not concern the *corporation*; but by consent the *venue* was changed into the county of *Gloucester*.

Rex *versus* The Parish of Silverton. B. R.

No new trial
where the de-
fendant is ac-
quitted on an
indictment for
not repairing
the highway.

INDICTMENT for not repairing the highway, and a verdict for the parish. It was now moved for a new trial (by Mr. *Pratt*,) for misdirection, or over-ruling evidence at the trial, by reason whereof the parish were unduly acquitted; *Per curiam*, This is a *criminal* case, and new trials are never allowed where defendant is acquitted in a *criminal* case. So also it is in *qui tam*'s and *informations* in nature of *quo warranto*'s.

The

The Honourable Alexander Murray's Case. B. R.

11 A 2 273

AN *habeas corpus* directed to the keeper of *Newgate* to bring up the body of *Alexander Murray*, Esq; whereupon it was returned and certified to the court that the prisoner by an order of the house of Commons of the 7th of February was committed to *Newgate* for an *high contempt* of that house, and he was not to be permitted to have pen, ink or paper, nor should any body be permitted to see him without order of the house; that the *keeper* was afterward served with several orders of the house to permit the Doctor and Apothecary and some relations to see him, and being now brought to the bar, and appearing to be in a very bad state of health from his imprisonment, Sir *John Phillips* Baronet, a member of the house (who seldom came to the bar) moved that he might be admitted to bail upon the *habeas corpus act*, 31 Car. 2. cap. 2. alledging that this statute was one of the great bulwarks of *English* liberty, and if the commitment be not for treason or felony, or by legal process issuing out of some court *here*, he is entitled to be discharged out of custody upon *bail*: He said it is well known that the house of Commons cannot take *bail*, and if this court will not admit the prisoner to *bail*, it will be in the power of the house of Commons perpetually to imprison; the *habeas corpus act* is of higher authority than an order of the Commons, who are but one branch of the Legislature, and however their orders may bind themselves, yet nothing less than an act of parliament shall bind the whole body of the people and nation. Liberty is the birthright of every subject, and he has a right to apply *here* for it.

One committed for a contempt of the house of Commons cannot be bailed by the King's Bench.

Wright Justice: It appears upon the return of this *habeas corpus* that Mr. *Murray* is committed to *Newgate* by the house of Commons "for an high and dangerous contempt of the privileges of that house"; and it is now insisted upon, at the bar, that this is a *bailable case* within the meaning of the *habeas corpus act*.

To this I answer, that it has been determined by all the Judges to the contrary; that it could never be the intent of that statute to give a Judge at his chamber, or this court, power to judge of the privileges of the house of Commons.

The house of Commons is undoubtedly an high court, and it is agreed on all hands that they have power to judge of their own privileges; it need not appear to us what the contempt was, for if it did appear, we could not judge thereof.

Lord *Shaftebury* was committed for a contempt of the house, and being brought here by an *babeas corpus*, the court remanded him. And no case has been cited wherever this court interposed.

The house of Commons is superior to this court in this particular; this court cannot admit to bail a person committed for a contempt in any other court in *Westminster-hall*.

Denison Justice: This court has no jurisdiction in the present case; we granted the *babeas corpus*, not knowing what the commitment was, but now it appears to be for a contempt of the privileges of the house of Commons; what those privileges (of either house) are we do not know, nor need they tell us *what* the contempt was, because we cannot judge of it; for I must call this court *inferior* to the house of Commons with respect to judging of their privileges and contempts against them; I give my judgment so suddenly because I think it a clear case, and requires no time for consideration.

Foster Justice: The *law of parliament*, is part of the law of the land, and there would be an end of all law if the house of Commons could not commit for a contempt; all courts of record (even the lowest) may commit for a contempt. And Lord *Holt*, though he differed with the other judges, yet agreed the house might commit for a contempt in the face of the house. As for the prisoner's illness we can take no notice of it, having no power at all in this case.

The prisoner was remanded. *Lee C. Justice* absent.

Gardener *versus* Davis. B. R.

6 Burt 110
In prohibition the issue laid upon the plaintiff, who did not appear at the trial, the defendant puts in his record, enters into the merits and takes a verdict, this is irregular, for the plaintiff ought to have been called and nonsuited.

IN *prohibition*, the parties were at issue, which was, whether a certain piece of land was parcel of the plaintiff's tenement; the proof of the affirmative laid upon the plaintiff; when the cause came on to be tried, the plaintiff (having countermanded notice of trial) did not appear, whereupon the defendant entred into his proofs, and the cause was tried upon the defendant's *record of nisi prius*, and a verdict was found for the defendant, and judgment has been entered thereupon. It was moved for the plaintiff that this was irregular, for that the plaintiff not appearing ought to have been called and nonsuited.

Upon shewing cause it was said for the defendant that both the parties in *prohibition* are *actors*, that both carried down the *record* and gave notice of trial, and that although plaintiff countermanded his notice, yet the defendant had a right to try the cause upon his record; and

and if the plaintiff knew he could not be ready, he ought to have moved the court to put off the trial, and the defendant being *actor* had a right to go into the merits, and to take a verdict.

For the plaintiff it was insisted, and resolved by the court, that although the defendant in *prohibition* is an *actor*, yet in this case, where the issue laid upon the plaintiff and he was to begin first, he ought to have been *called and nonsuited* if he did not appear, and therefore the proceeding to take a *verdict* is irregular, and must be set aside. Indeed if the issue had laid upon the defendant, and he had been obliged to begin first, it might have had another consideration, but as to that they gave no opinion; the verdict was set aside as irregular, but without costs, this being a new case.

Same *versus* Same. B. R.

THE verdict being set aside as above, it was moved that the defendant might be at liberty to enter a *nonsuit* upon an *affidavit* that the plaintiff did not appear at the trial. But *per curiam*, A nonsuit cannot be *now* recorded *here*, it ought to have been recorded by the Judge of *Nisi prius*.

A nonsuit at
Nisi prius
cannot be
recorded in
Bank.

Rex *versus* Combrune. B. R.

INDICTMENT, charges that the defendant did fraudulently and deceitfully deliver to *Susan Farmer*, wife of *James Farmer*, 274 gallons and three quarts of strong beer, when he ought to have delivered 288 gallons, as was agreed and paid for, (the sum of 9*l*.)

Indictment for
a deceit of a
private nature
quashed.

It was moved to quash this indictment, that this was a fraud of a private nature, for which an *action* upon the *case* for a *deceit* was the proper remedy, and here is no charge that the defendant sold by *false measure*.

Per curiam. This is a mere action of *deceit*, and the *indictment* must be quashed.

Earl *versus* Brown. B. R.

Plaintiff dies
after a verdict
and before the
day in Bank,
though the
judgment be
right yet a
scire facias
must be a-
warded before
execution.

THE plaintiff died after the *verdict* and before *judgment* was entred thereupon. Afterwards *judgment* was entred and an execution taken out, without any *scire facias* sued out at the suit of the plaintiff's representative. And now it was moved to set aside the execution of *feri facias*; and it was held that although the judgment was regularly entred by the 17 Car. 2. c. 8. yet the *feri facias* issued irregularly, for there ought to have been a *scire facias*; so the *feri facias* was set aside, and the money levied thereupon ordered to be restored to the defendant, *per totam curiam*.

Anonymous. B. R.

After a plea
in abatement
and demurrer
the plaintiff
must pray a
*respondeas
ouster*, and
not judgment
in chief.
Carth. 137.

THE defendant pleads in *abatement* that there is no such person as the plaintiff in *rerum natura*, the plaintiff replies that there is, *viz.* at *Westminster*, defendant demurs, plaintiff joins in demurrer and prays judgment and his damages, which being in *chief* is wrong, for it ought to be that he *may answer over*. *Per curiam*, Let it stand over with leave to the plaintiff to move to amend on payment of costs.

Trinity Term

24 & 25 Geo. 2. 1751.

Rex *versus* Ponsonby & al'. In Error.

INFORMATION in nature of a *quo warranto* in the King's Bench in Ireland, to shew by what authority the defendants claim to be burgeses of a certain borough. The information, pleas, replications, rejoinders, demurrers, and joinders in demurrer, all appear to be of *Trinity* term in the 21 & 22 Geo. 2. after the joinders in demurrer there appears to be an entry of a *continuance* by *curia advisare vult* and day given by the court in *Easter* term following, skipping over two terms, viz. *Michaelmas* and *Hilary* terms 22 Geo. 2. and then judgment is entred for the King of *Easter* term 22 Geo. 2. a writ of *error* is brought and the record being transcribed and sent hither, it was moved to amend the record *here* by inserting two *continuances* which are omitted, and it was urged for the King, 1st, That if this was a *misprision* of the clerk or of the court, that it is amendable by this court, and 2^{dly}, That it was a *miscontinuance* and not a *discontinuance*, and in either case amendable at common law.

Amendment by adding continuances cannot be made in a record transcribed without some record to amend by, but the court will grant a *certiorari* to send for the continuances.

For the defendants it was said, that the record being made up and transcribed hither, the court must look upon it as the act of the court and not the *misprision* of the clerk, and that this is a *discontinuance* of the suit; and the case of *Friend v. Baker*, *Style* 339. was relied upon.

Lee Chief Justice: This is an application to the court to make a *continuance* upon a record removed *here*; I agree that *discontinuances* or *miscontinuances* before judgment are the acts of the clerk, but after judgment is entred and the record closed and made up, *discontinuances* are the acts of the court. *Comyns* 419. And we have nothing to amend by. I also agree that the *superior court* where *error* is brought may make such *amendments* as the court below may, but *that* can only be done when the *superior court* has the same matter to amend by, as the *inferior* has. In the case of

Trin. 4 Geo. 1. *Winkworth v. Clarke*, which was *error in debt* from the C. B. upon a judgment by default; the *placita* was of *Hilary* term, the want of an original was assigned for *error*, and *in nullo est erratum* was pleaded, which closed the record; diminution was alledged, and thereupon an *original* was returned hither returnable of the *Michaelmas* term preceding the *placita*, without any continuance to *Hilary* term; this court could not insert a *continuance*, but *ex debito justitiæ* sent a *certiorari* to the C. B. to inform the conscience of the court whether there was any *continuance*, and the C. B. sent up the *continuance*, and it was not once thought of, or insisted upon by those who argued this case that this court could make the *continuance*; this is a very strong case in point.

2 Stra. 735.

Wright Justice: I am of the same opinion; the court in *Winkworth v. Clarke* said the *certiorari* was grantable *ex debito justitiæ*, and there was no imagination that this court could add the *continuance*.

Denison Justice: This is a *discontinuance*, and is fatal upon a demurrer, and there is no statute of *Jeoffails* that will help it; for aught we know there may be a record in *Ireland* that will make it compleat, and therefore we can grant a *certiorari* to inform the conscience of the court before we give judgment; but I never heard that after a record is sent hither that this court could amend it without something to amend by; this is quite a new kind of application.

Foster Justice of the same opinion: And so the rule to shew cause why the *continuances* should not be inserted was discharged. Sir *Thomas Bootle*, Sir *Richard Lloyd*, Mr. *Hume Campbell*, and Mr. *Ford* for the King. Serjeant *Poole*, Mr. *Henley* and Mr. *Jodrell* for the defendants.

Thompson *versus* Marshall. B. R.

Plaintiff must
intitle his de-
claration agreeable to
truth.

PER curiam, the defendant has a right to call upon the plaintiff to intitle his declaration agreeable to the true time of delivering it to the defendant.

Rex

Rex *versus* Clapham, an overseer of the poor. B. R.

A *Mandamus* was granted to oblige the *old overseer* of the poor to deliver over the books of the poor's rates to the *new overseer*; for *per curiam*, They are public books, and ought to be delivered over by one overseer to another, that all the parishoners may have access to them, and the overseer and churchwarden for the time being ought to have the custody thereof.

4th & 6th 1799.
Mandamus to the old overseer of the poor to deliver the parish books to the new overseer

Read, executor of Tuack, *versus* Nash. B. R.

TUACK the plaintiff's testator brought an action of assault and battery against one *Johnson*; the cause being at issue, the record entred and just coming on to be tried, the defendant *Nash* being then present in court, in consideration that *Tuack* would not proceed to trial, but would withdraw his record, undertook and promised to pay *Tuack* 50*l.* and the costs in that suit to be taxed till the time of withdrawing the record, in which taxation all such sums of money were to be allowed as *Tuack* had paid and was liable to pay to his attorney and witnesses who attended the trial; *Tuack* relying upon this promise did withdraw his record, and no further proceeding was had in that cause; *Tuack* being dead, *Read* his executor has brought his action upon this special promise and undertaking by *Nash*.

6th Decr 204
2 B.R. 613
10th Decr 664
Promise, whether within the statute of frauds and perjuries.

A promise to pay damages by a third person in case the plaintiff will withdraw his record, is not within the statute of frauds.

The defendant has pleaded *non assumpsit*, and thereupon issue is joined to the country; 2dly, He has pleaded the statute of frauds and perjuries; that the plaintiff ought not to have his action against him, because he says there was a statute made in the 29th year of King *Charles* the second for prevention of frauds and perjuries, whereby it was enacted, that from and after the 24th day of *June* 1677. no action should be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action should be brought, or some memorandum or note thereof should be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised; and then says, that the plaintiff *Read* has brought this action to charge him the said defendant with the debt, default or miscarriage of the said *Johnson*, and that there never was any agreement in writing touching this promise, nor any memorandum thereof; and this he is ready to verify, &c.

To this plea the plaintiff has demurred, and the defendant has joined in demurrer.

This case was twice argued at the bar, and after time taken by the court to consider, the Chief Justice delivered the opinion of the court.

Ld. Raym.
11035.

Lee Chief Justice: The single question is, Whether this promise which is confessed by the demurrer not to have been in writing is within the statute of frauds and perjuries, that is to say, whether it be a promise for the debt, default or miscarriage of another person; and we are all of opinion that it is not, but that it is an original promise sufficient to found an *assumpsit* upon against *Nash*, and is a *lien* upon *Nash*, and upon him only. *Johnson* was not a debtor, the cause was not tried, he did not appear to be guilty of any default or miscarriage, there might have been a verdict for him if the cause had been tried for any thing we can tell; he never was liable to the particular debt, damages or costs. The true difference is between an *original* promise and a *collateral* promise, the *first* is out of the statute, the *latter* is not when it is to pay the debt of another which was already contracted. Judgment for the plaintiff.

2 Inst. 645

Snee versus Humpreys an Attorney of the C. B. B. R.

An attorney of the C. B. arrested by a *latitat* must plead his writ of privilege, and proceedings against him not discharged on motion.

AN attorney of the Common Pleas was arrested by a *latitat*; Mr. *Henley* moved that the proceedings against him *here* might be set aside, alledging that he ought to have been sued in the Common Pleas by bill. But *per curiam*, You must sue out your writ of privilege, for if you are an attorney of the Common Pleas, and are *rectus in curia* there, you will have it of course, and may plead it here.

Dale versus Eyre and others.

Nolle prosequi may be entered as to a defendant who ought not to have been joined.

TROVER against a defendant-executor and other defendants not executors, for a conversion in the life-time of the defendant-executor's testator; *verdict* against the defendants not executors, and the defendant-executor found *Not guilty*.

It was objected in arrest of judgment, that *this* being a *tort* does not survive, and you cannot join the executor a defendant with the others.

To this it was answered, that if trover be brought against several persons, and one dies, the writ does not abate. 11 Rep. 45. suppose all

Trinity Term 24 & 25 Geo. 2. 1751. 307

all the defendants had been found guilty, the plaintiff might have entred a *nolle prosequi* as to any of them.

Curia: What do you say to that? cannot the plaintiff enter a *nolle prosequi*? You come too soon, we cannot tell but the plaintiff may help it by the entry. Rule to shew cause why judgment should not be arrested discharged.

If Counts are misjoined the Plaintiff cannot enter a Nolle Prosequi on one of the Counts, after Demurr.
1. H. H. 100 & note L. J. R. 360

4. 2d Inst. was for
Deft. to

Michaelmas Term

25 Geo. 2. 1751.

Between the Parishes of Tetbury and Ilam. B. R.

RULE to shew cause why an order of two justices confirmed by the sessions to remove a *pauper* from Tetbury to Ilam should not be quashed. The order states that Mr. Pope of Ilam hearing the *pauper* was a boy likely to be fit for his service, sent to his father to desire he might come upon liking, the boy came and continued upon liking eight weeks, and then it states that Mr. Pope hired him for a year to commence from the beginning of the eight weeks he had been on liking, and that the boy continued in Mr. Pope's service at Ilam a year and ten days from his first coming upon liking.

There must be a hiring either absolute or conditional for a year and a service for a year to gain a settlement.

Per curiam, This case differs from all the cases; a coming upon liking is not like a conditional hiring at the first; There must be a hiring for a year either absolute or conditional previous to the service for a year; the hiring here has a retrospect to past liking; and the court held the *pauper* gained no settlement at Ilam, and quashed the orders of the justices and sessions.

Parsons

Parsons *versus* Freeman and others. In Chancery,
November 9.

What act shall
amount to a
revocation of
a will.

MRS. Freeman being intitled under Mr. Sawyer's will to an estate-tail in the lands in question after the death of Mrs. Sawyer, and also to an estate in fee in other lands, by articles in 1739. in consideration of a settlement to be made upon her by Mr. Freeman, covenants that the *lands in question* shall be conveyed to him in fee, and the other estate to him for life.

Mr. Freeman being thus intitled to an equitable estate under the articles, afterwards and before the same were carried into execution by legal conveyance makes his will, and *devises* the *lands in question* to some of the defendants.

After the making his will, he having the equitable, and his wife having the legal estate, join in a deed to make a tenant to the *præcipe* to levy a fine and suffer a recovery (which were both done) and declare the same shall enure to such uses as they two should by deed jointly direct, limit and appoint, and in default thereof to the use of Mr. Freeman the husband in fee. The wife lived sometime afterwards, the husband survived, and no joint deed of appointment was ever made by them.

The question in this case is, Whether the fine and recovery and deed to lead the uses thereof be a *revocation* of Mr. Freeman's will as to those lands whereof Mrs. Freeman was seised in tail, and wherein Mr. Freeman had an equitable title in fee at the time he devised the same.

It was argued for the plaintiff (Mr. Freeman's heir at law,) that this amounted to a revocation of the will; that it is a known principle if a man seised in fee makes his will, and after makes a feoffment or other conveyance in fee, and then takes back a new estate in fee, that *this* is a revocation of the will; for wherever a man puts the whole interest of the lands out of him by any conveyance whatever, though he take it back again the next day, it will amount to a *revocation*. Indeed in the case of a *mortgage* it is not a *total revocation*, but only *pro tanto*, for the *mortgagor* does not part with his *whole* interest, but he, his heir, or devisee, may redeem, 3 Wms. 163. 1 Ro. Abr. 616. *Earl of Lincoln* and *Rolls*. Eq. Cas. Abr. 411, 412. *Pollen and Husband*, *Ibid*.

Titm

Titner v. Titner, In ejectment about a year ago was a case reserved for the opinion of Lord Chief Justice *Lee*: *Robert Titner* died in 1741. seised in fee of the lands in question being *Gavelkind*, leaving two sons *Robert* and *Henry* (the plaintiff's lessor) who both entered upon their father's death, and were each seised of an undivided moiety, and being so seised *Robert* the son the 12th of Feb. 1742. by his will devised all his lands and tenements, and all his said moiety whereof his father was seised, to his wife the defendant *Eliz. Titner*; afterwards in 1745. a deed of partition was made and executed by and between *Robert* and *Henry*, and the premises in question were allotted to *Robert*, and it was covenanted therein that they and their wives should all join in levying a fine (which was done) and that the same, as to the lands in question, should enure to the use of *Robert Titner*, and such person and persons, and for such estate and estates, as he should, by deed or will, limit, direct or appoint, and in default of such appointment, to the use of *Robert Titner* in fee; Lord Chief Justice *Lee* clearly held this a *revocation* of the will, and not like the case of a bare partition only made by the sheriff (unattended with a fine or conveyance to the new use) which would not have been a *revocation*.

That where there is a deed of covenant to levy a *fine* to certain uses, and before the *fine* is levied all the same parties enter into a second deed, and declare that the *same fine* shall enure to different uses, in this case the *uses* of the *fine* shall be directed by the second deed. *Moor* 1107. 2 And 46. for until the uses be executed, *that is*, until the fine be actually levied and executed, the parties may vary the uses (if they all agree) as they please. *Jones v. Morley*, 2 Salk. 677. in *Carth.* and other books.

On the other side it was argued for the devisee, That this is not a *revocation* of the will as to the lands in question, that Mr. *Freeman* at the time of making his will had an equitable estate in fee therein, as much as if he had purchased the same with his own money in the name of another person; this equitable estate he devises by his will, and the recovery and fine, as to the lands in question, do no more than convey a legal estate to him, who before had an equitable estate in fee therein, and is no ways inconsistent with, nor shews any kind of intention in him to revoke his will as to this estate, and this conveying the legal fee to him is only a performance of part of the articles; the case of *Titner* and *Titner* wholly concerns a legal estate, and there was a new estate and new uses raised of *that* which was a legal estate at first, which were the grounds of that determination, The recovery in the present case created a fee in somebody, which (if no uses had been declared) would have been subject to such trusts as the tail before was subject to, and if the legal estate thereupon resulted to Mrs. *Freeman*, it must be in trust for her

husband under the articles, and in case of her death her heir would have been trustee for him.

It was admitted by the devisee's counsel that it is generally true where a man seised in fee devises, and after conveys in fee, and takes back an estate in fee by a new conveyance, that *this* amounts to a *revocation*; but they strongly insisted that the conversion of a *legal* estate into an *equitable* one, or an *equitable* estate into a *legal* one, does not amount to a *revocation*.

Lord Chancellor *Hardwicke*: Determinations in cases of *revocations* of wills have always been favourable to the heir at law. It is admitted on all hands that if the testator had had a legal fee, devised it, and afterwards suffered a recovery, it would have amounted to a revocation of his will; or if the recovery had been declared to be to such uses as he should direct, and for default thereof to the testator in fee, that this would also have amounted to a revocation; and it is as certain likewise that if a man seised in fee, devises, and afterwards conveys the same away by any legal conveyance whatever, and takes back again a new estate, this would be a revocation of the devise; but there are cases go further, for if one seised in fee devises, and after levies a fine to his own use in fee, this has always been held a revocation, though the testator is *in* of the *old use*; this is a prodigious strong case; the reason is, that courts of justice, in favour of the heir, will presume the testator had some intention to alter or revoke his will in favour of the heir, by such an act done after the will.

Indeed where the testator seised in fee, afterwards leases for years or lives, or mortgages, or conveys to pay debts, these are only *revocations pro tanto*, and shew particularly how far the testator intended to alter his will, by drawing the line exactly.

It is objected, that although what I have said of a *legal* estate be true, yet it is not so of an *equitable* estate; but I am of opinion that it is, for it would be an iniquitous thing to determine that it is not, for then a court of equity would decree contrary to law; and therefore if a man seised of an *equitable* estate devises it, and afterwards a new conveyance is made with his consent, and some new trust declared for him, this would be a revocation; but, as I said before, a mortgage, or a conveyance in trust for payment of debts, would be only *revocations pro tanto*, for by *these*, a specific intention is shewn; so is 2 *Vern.* 295. and so is *Ogle and Cooke.* 20 Feb. 1748. where a real estate was devised, and afterwards the testator conveyed it in fee to be sold to pay money to Mr. *Cooke* and the surplus to be paid to the plaintiff, though the whole to be sold, yet I held it only a *revocation pro tanto*, and think the determination is right;

so that the devisee in these cases shall have a redemption, or the surplus after debts paid.

To come to the present case; I take it for granted on both sides, that Mr. *Freeman* when he made his will had an equitable estate in fee in the lands in question, and the like for life in the other lands, for he could have compelled a specific performance of the articles, and obliged his wife to make a legal conveyance agreeable thereto; he, having this interest, makes his will, which could only have operated to convey *those* in question to the devisee, for the other he had only for life: then a fine and recovery are had of *all* together, and the uses thereof declared as above; the wife lives some years afterwards, he survives, no appointment was ever made by them, he gains a legal fee hereby in *the whole*; this is certainly more than gaining to himself a legal estate in the lands wherein, before, he had only an equitable one, for he has, besides declaring the same to other uses, gained to himself a legal fee in *that* wherein he before had only an equitable estate for life. Indeed if a man has an equitable estate which he devises, and after takes by legal conveyance the legal estate therein, in that case I am of opinion it is no *revocation*, for this is the common case where a man contracts for the purchase of lands, and before any legal conveyance thereof made to him, he devises the same and dies, the devisee shall compel a specific performance, and shall have sufficient of the testator's personal estate to pay the purchase money; and though the *devise* be between the articles and the legal conveyance it is no *revocation*, for be it of what kind soever, it is only instrumental in changing an *equitable* into a *legal* estate, and makes no alteration in the will.

But notwithstanding this, it cannot be laid down as a general rule, that the turning of a *legal* estate into an *equitable* one will not be a *revocation*; for if a man seised in fee, devises and afterwards conveys in trust for himself, this certainly would be a *revocation*, and differs from 2 *Vern.* 495. and from *Ogle v. Cooke*, which were to *let in* particular securities and made no alteration, but just so far, *pro tanto*. And if Mr. *Freeman* had only taken a fee in the lands in question, and nothing more, it would have been no *revocation*; but it is most plain (though there be no proof) they came to a new agreement, to wit, that she should be *let in* to join with him in an appointment, and he, in consideration thereof, was to have a fee in *that* estate wherein, before, he had only an estate for his life. And though it is said, that as to the particular estate in question, it was only turning an *equitable* into a *legal* estate, yet it ought to appear that *that* was singly the purpose, but here it appears it was to vary his interest in the other lands, which differs this from all the cases of *revocation pro tanto*, for the recovery and uses were to operate over the whole fee of both.

Suppose a man seised in fee devises, and afterwards makes a settlement on himself for life, remainder to his first and other sons in tail without trustees to preserve contingent remainders, the fee is in him until a son is born, and if no son be ever born the fee will never be out of him, there can be no doubt but this would be a *revocation* of his will, though no son ever born; the case of *Lord Lincoln v. Roll* is a strong case to this purpose. In the present case the power of appointment was such a particular purpose as might operate over the whole fee of both estates whenever they pleased; and if Mr. *Freeman* had been seised of a legal fee, and had had a mind to let in his wife to join with him in such an appointment, he must have made a new conveyance for that purpose, which would certainly have been a *revocation*. And *The case of Titner v. Titner* determined by a learned judge, is a very strong authority, and very apposite to the present case. Decreed it a *revocation* of the will.

Todd *versus* Dodd. B. R.

Warrant of attorney to confess judgment to two, one dies before the judgment entred, leave given to the survivor to enter it.

RICHARD Dodd executed a warrant of attorney dated May 8, 1746. to confess a judgment for 400 l. to John Todd the elder and John Todd the younger; John Todd the elder is dead, and now it is moved by Mr. Williams, that John Todd the survivor and executor might have leave to enter up judgment upon affidavit that this warrant of attorney was given by the defendant to the two Todds to secure and indemnify them against a bond which they entred into on the behalf of the defendant for 200 l. which appeared to be so by an indorsement upon the back of the warrant of attorney. Cases cited, *Perk. Feoffment* f. 192. 1 *Inst.* 52. a. b. 8 *Rep.* 82. *Salk.* 87. *Ld. Ray.* 849. *Sir T. Ray* 18. *Salk.* 400. 1 *Sho.* 91. *Ro. Abr.* 331. tit. *Authority.* *Salk.* 117. 1 *Barnes* 35. *Still v. Still* in C. B. 2 *Barnes* 38. *contra.*

The last resolution of the Common Pleas was, that the power ought to be strictly pursued; but notwithstanding that case, the whole court of B. R. after time taken to consider, gave leave to the plaintiff Todd the survivor to enter up judgment, and they said this was a stronger case than any that had been cited.

Smith

Smith *versus* Evans. In Scaccario. At Serjeants Inn,
Dec. 6, 1751.

822 194

IT was said by Lord Chief Baron *Parker*, Baron *Clive*, and Baron *Smythe* (*absente Legg*) that which is said by *North*, *Wildbam*, and *Charlton* in 3 *Lev.* 1. "That putting a seal to a will is a sufficient signing within the statute of frauds and perjuries," is very strange doctrine; for that if it was so it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead, for he would have no occasion to forge the testator's hand. And the barons said if the same thing should come in question again, they should not hold that sealing a will only, was a sufficient signing within the statute.

Sealing a will is not a sufficient signing of it within the statute of frauds and perjuries.

Lake *versus* Lake. In Chancery, Nov. 8, 1751.

THIS was a bill preferred by the testator's next of kin against his widow, who was his executrix, to have a distributive share of the personal estate undisposed of, the testator having given her by his will a legacy of 1400 *l.* upon condition that she did not suffer a bond (which he gave upon his marriage with her to leave 400 *l.* to such children as they should have) to affect the assets, and they never had any children; he also left her an estate in land.

Parol proof admitted that the testator intended his wife executrix should have the residue.

The widow executrix insists she is well intitled to the residue notwithstanding this legacy and the devise of lands to her, for that the testator has frequently declared his intention that she should have the residue, and this the defendant has in proof.

For the plaintiff it was objected that the testator's parol declarations ought not to be admitted; the evidence is that the witness in travelling with the testator, who was not very well in health, and talking of serious things, the testator said he had done very handsomely for his wife, and that he had done very well also for his sister and brother, and said that after his debts and legacies were paid he hoped there would be something very handsome for her besides; that he had given his wife half of his money in a sum certain, and if she had good luck in getting in his debts, there would be something more, which would be all her own.

Per Lord Chancellor: If making a wife executor of itself should be allowed to be a good reason why she should have the residue when she has a considerable legacy, we shall not know where to

PART I.

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stop;

stop; but were a wife is executor, and there is a great affection proved to be between them as here is, it is very reasonable to admit this kind of parol proof, and a less evidence than this would have turned the scale in her favour; therefore the bill must be dismissed.

Hilary Term

25 Geo. 2. 1752.

Nota; The year of our Lord 1751. consisted of no more than 282 days. The year of our Lord 1752 began upon the 1st day of January, and consisted of no more than 355 days from the 2d to the 13th of September this year both inclusive being expunged out of the calendar, in order to reduce it to the New Style.

3 April. 1752

Lewis *versus* Willis. B. R.

Nil habuit in tenementis is a bad plea to an assumpsit for the use and occupation.

INDEBITATUS *assumpsit* for the use and occupation of lands; the defendant pleads *nil habuit in tenementis* at the time he permitted the defendant to occupy the land; plaintiff demurs. *Per curiam*, This is a bad plea to an action upon the case for the use and occupation, and so it was determined in the case of *Richard v. Holditch*, Hil. 13 Geo. 1. but in debt for rent upon a lease not indented, this plea may be pleaded, because an interest passes by a lease; besides the plea is ill pleaded, for it ought to say that the plaintiff had nothing in the tenements at the time of the action, nor at any other time; there is no occasion for the plaintiff to shew any title upon these contracts. *Vide stat. 11 Geo. 2.*

Wallop

Wallop *versus* Irwin. B. R.

THE defendant died *after* the rule to plead was out, but *before* the time given to him by a Judge's order for pleading was out, and the plaintiff signed an interlocutory judgment, and sued out a *scire facias* thereupon against the defendant's executor upon the *stat. Will* 3. c. 11. s. 6. to shew cause why damages should not be assessed and recovered; Mr. Ford moved to set the proceedings aside, alledging that the writ abated by the death of the defendant before interlocutory judgment was signed notwithstanding the rule to plead was out; and cited the case of *Sibert v. The executor of General Russell*, Mich. 9 Geo. 2. where it appeared the General died at Bath a day or two before the time for pleading was expired; Lord Hardwicke and the court held the suit abated. Proceedings set aside as irregular.

Defendant died before the time given to plead expired, judgment signed after and process thereon are irregular.

Wingfield *versus* Stratford & al'. B. R.

TROVER for a gun; the defendants plead that the plaintiff kept the gun to kill game, and not being qualified, they justify (as game-keeper and servants to J. S. lord of the manor,) the taking away the gun from the plaintiff; but the plea doth not alledge that the plaintiff was out sporting with the gun, nor where the gun was taken; plaintiff demurs.

A gun is not an engine to kill game.

5 B. & A. 317

And the court held that a gun is not necessarily to be taken to be an engine to kill game, as it does not appear upon this record that the plaintiff killed game with it; he might use it to shoot crows, or destroy vermin; and it is not like nets and pointers, and such dogs, which can only be kept for killing the game. Judgment for the plaintiff. *Vide* 2 Stra. 1098.

Rex *versus* Eliz. Spencer.

THE defendant was indicted for perjury, put in bail, was tried and acquitted, and now the bail moved that they might be discharged from their recognisance; the clerks of the crown-office opposed this, and said the course of the court was, not to discharge the bail until the acquittal of the defendant was entred upon record.

One acquitted of perjury, the bail shall be discharged though the acquittal be not entred of record.

Wright and *Denison* Justices, at first doubted, and were for respiting the recognisance until the next term; but *Foster* Justice *totis viribus* insisted the bail ought to be discharged, for that by the *poſtea* in

in court it appeared the defendant had been acquitted, and cannot be called upon again for the same charge, and he said if the court should respite the recognizance till next term (which would cost no less than 1*l.* 6*s.* 8*d.*) it would be establishing a practice for the benefit of the clerks in court, to the prejudice of the subject, which he could never agree to. Afterwards *Wright* and *Denison* (*absente* Ch. Justice *Lee*) concurred with *Foster*; and the recognizance was ordered to be discharged; and they said if any body was aggrieved by this order, let them apply to the court next term, if they think fit.

Murray *versus* Wilson. B. R.

1 *Current* *Mss.* 302

Debt upon a
judgment of
nonfuit in an
inferior court.

THIS is an action of debt upon a judgment of nonfuit in an inferior court; the declaration is as follows:

Surry (to wit) *Robert Murray* complains of *George Wilson*, being in custody of the marshal of the *Marshalsea* of our Lord the now King, before the King himself, of a plea that he render to him 3*l.* 19*s.* 4*d.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; for that whereas the said *Robert* heretofore, that is to say, at the court of record of our Lord the now King of the liberty of the mayor, commonalty and citizens of the city of *London*, of their town and borough of *Southwark* in the county of *Surry* aforesaid, held at the court-house within the town and borough aforesaid, and within the jurisdiction of the said court, on *Monday* the 19th day of *November* in the 24th year of the reign of our Lord the now King, before *William Moreton*, Esq; then steward of the said court, according to the custom of the said town and borough aforesaid, from time whereof the memory of man is not to the contrary used and approved of within the town and borough aforesaid, by the consideration of the said court recovered against the said *George* 3*l.* 19*s.* 4*d.* for his costs and charges by him laid out and expended, in and about his defence, in a certain plea of trespass on the case on promises by the said *George* in the said court of our said Lord the King of the borough and liberty aforesaid, before then commenced and brought against the said *Robert*, adjudged to the said *Robert*, and at his request in and by the said court, for that the said *George* did not further prosecute his plaint in the said suit, but became nonfuit therein; whereof the said *George* was convicted, as by the record and proceedings thereof remaining in the said court at *Southwark* aforesaid may more fully and at large appear which said judgment still remains in its full force, strength and effect, not reversed, vacated, annulled, discharged or satisfied; and the said *Robert* hath as yet obtained no execution of the aforesaid judgment, whereby an action hath accrued to the said *Robert* to demand and have of the said *George* the said 3*l.* 19*s.* 4*d.* yet the said *George*, though often requested, hath not yet

yet rendered the said 3*l.* 19*s.* 4*d.* or any part thereof to the said *Robert*, but to render the same to him hitherto hath and still doth wholly deny, to the said *Robert* his damage of 10*l.* and therefore he brings his suit, &c.

To this declaration the defendant has put in a general demurrer, and the plaintiff has joined in demurrer, which is entered of *Easter* term last, *Rotulo* 373.

Mr. *Weller* for the defendant objected, That debt upon a judgment of nonsuit in an inferior court would not lie; and 2*dly*, That if it will lie yet the declaration is bad in substance, for it does not appear that the plaint in the court below was levied for a cause of action arising within its jurisdiction; and 3*dly*, The declaration ought to have set out the plaint and the subsequent proceedings thereon, and cited some old cases to shew this.

Mr. *Wilson* for the plaintiff: At common law neither plaintiff nor defendant had any costs, they were given to the plaintiff by the *stat.* of *Gloucester*, 6 *Ed.* 1. but the defendant had no costs until (above 250 years after that time) by the *stat.* 23 *Hen.* 8. c. 15. it was enacted, that if any person after such a day shall commence or sue in any court of record, or elsewhere in any other court, any action, bill or plaint in any of the particular cases there specified, and the plaintiff in such action shall be nonsuited, or a verdict pass against him, that the defendant shall have judgment to recover his costs, &c.

This being found to be a beneficial law with respect to the particular actions to which it extended, the legislature by the *stat.* 4 *Jac.* 1. c. 3. extended it to defendants in every action wherein the plaintiff or demandant might have costs if judgment should be given for him, and to have the like process against the plaintiff as by the statute of 23 *Hen.* 8.

One or both of these statutes create the debt or duty for which the present action is brought, and there is no doubt but the action well lies *here* if the declaration has sufficiently shewn the cause of it. The substance of these two statutes is no more than *this, viz.* That if a plaintiff commences an action, in any court whatever, is nonsuited, or have a verdict against him, and costs adjudged against him by that court, the defendant shall have process to recover. All this matter the present declaration shews with the utmost clearness and certainty.

For the plaintiff therein sets forth, that he, at a certain court of record, held at a certain place within its proper jurisdiction on the 19*th* of November 24 Geo. 2. before the judge of that court, by

PART I.

4 M

consideration

consideration of the court recovered against the present defendant 3*l.* 19*s.* 4*d.* for his costs expended about his defence in a plea of trespass upon the case, by the defendant in the same court commenced against the present plaintiff adjudged to him at his request by the same court, for that the said *George Wilson* did not further prosecute his plaint in *that* suit, but became nonsuit therein whereof he was convicted *prout per recordum*, &c. here is an action alledged to be commenced or plaint levied, a nonsuit, and costs adjudged within the proper jurisdiction.

Debt lies upon a judgment of nonsuit for 16*s.* costs in an inferior court, upon the *stat.* 23 H. 8. *Harwood v. Fairburne*, Cro. Eliz. 96. and to the like purpose is 1 *Leon.* 316. case 344.

Having shewn that the action well lies, it will be proper to answer the objections taken to the declaration, which seem to go rather to it's brevity than it's substance.

It must be admitted, that formerly, in actions of this kind the superior courts required greater exactness, and particularity in setting forth the whole process of the suit in the court below from the pledges to prosecute to final judgment; but, of later years, a greater latitude and more general way of pleading proceedings in courts hath been allowed. Anciently if a man pleaded a judgment recovered in a court in this hall, he set forth the whole record *verbatim*; afterwards they came to allow of a *taliter processum fuit*, and an abridgment of the proceedings; and lastly they allowed a *recuperavit* only to be well enough, because all proceedings in superior courts were presumed to be regular until the contrary was shewn: but this concise way of pleading was a long time denied (in respect) to inferior courts, because they were tied to stricter forms, and therefore were forced to set out the whole process. However at length a *taliter processum fuit* was allowed to inferior courts, provided still they were courts of record; and now this short method is at last allowed in pleading a justification under a recovery in an hundred court, because the whole process must be given in evidence; so that such a formal nicety, and tedious prolixity is not now required; but our learned judges in these later and happier days have rather been *astuti* to do justice, than to find out little slips in pleadings.

To shew this, 2 *Lev.* 81. *Doe v. Parmiter*; trespass for taking the plaintiff's cattle; the defendant justifies under a plaint levied in an hundred court by the plaintiff against J. S. whereupon *taliter processum fuit* that the plaintiff was nonsuit, and costs taxed, and a precept to levy, by which he took the cattle *absq' hoc* that he was guilty before the delivery of the precept or after the return; the plaintiff demurred, and it was objected that this short way of pleading

pleading a judgment in inferior courts is not allowable; but the objection was over-ruled and the court said the pleading was well enough. For the like purpose 3 *Lev.* 403. *Patrick v. Johnson* 2 *Mod.* 102. *Lane and Robinson*. And 2 *Mod.* 195. *Higginson and Martin*.

But it is further objected that the declaration is ill, because it does not alledge that the plaint was levied for a cause of action arising within the jurisdiction.

In answer to this objection, it may be admitted that if this had been an action brought by one who was plaintiff below and had recovered there, the objection might have had some weight in it, and it might perhaps have been incumbent upon him to have shewn that every step he himself had taken in the inferior court in which he was the actor was legal and regular, and that his cause of action arose within its jurisdiction; but surely it cannot be necessary for the present plaintiff, who was defendant below, to shew that the plaintiff there proceeded legally. Suppose *Wilson* the plaintiff below had no cause of action at all (which is really the truth) how could it with truth be alledged that the plaint was levied for a cause of action which arose within the jurisdiction; and if it be necessary to alledge this, it must be necessary to prove it, and that would have been impossible.

Suppose there is not one legal or regular step in *Wilson's* process below; yet if the nonsuit be properly recorded, *that* is a sufficient ground for the present plaintiff to maintain this action, and is the only *gist* thereof; for this purpose *Hob* 219. *Drury v. Finch*. This was an action for words not actionable, and at the trial the plaintiff was nonsuit; and now it was said by his counsel that the defendant was to have no costs, because the words are not actionable; but Lord *Hobart* says, "I was of a contrary opinion, for the words of the law are plain and general that the defendant shall have costs of the nonsuit, and the vexation is more gross if there were no cause of action, for else a man might sue with more safety where he had least cause, and so costs adjudged." So in the present case it must be taken upon this declaration, which is admitted to be true by the demurrer, that the defendant *Wilson* commenced a suit in a court below for a cause of action which he could not prove at all, or could not prove that it arose within the jurisdiction. To the like effect are *Palm.* 147. 2 *Ro. Rep.* 213. *Palm.* 365. *Hob.* 284. *Styl.* 149. *Heylers's case*, *Cro. Car.* 175.

The court gave judgment for the plaintiff upon the first argument, and said, that the declaration was a very good one both in

form and substance; the nonsuit is laid to be given and recorded at a court held within its proper jurisdiction, and that is sufficient, and the plaintiff below's process may be illegal from beginning to end for aught we know; and the declaration would have been good upon a special demurrer. And they held the argument for the plaintiff, and the cases cited, to be good law.

Baugh versus Price. In Scaccario.

Articles and conveyances set aside for fraud and imposition.

THIS bill was preferred by the plaintiff who is the son and heir of *Thomas Baugh*, who was the son and heir of *Rowland Baugh*, to set aside articles, and several deeds and conveyances under them made by the plaintiff's father *Thomas* to the defendant.

In *October* 1739. *Rowland Baugh* the grandfather was about 72 years old, afflicted with the gout and a rupture, and his life not worth above one year's purchase, being tenant in tail of an estate called *Stonehouse* with remainder to himself in fee, worth about 3000 *l.* his son *Thomas* being heir expectant in tail and in necessitous circumstances, by articles of agreement of the 21st of *October* 1739. in consideration of 1500 *l.* to be paid to him by the defendant within a year, and of an house in *Prisstein* worth 200 *l.* to be conveyed to *Thomas Baugh*, he covenanted to convey to the defendant the said estate in fee simple, subject to the estate for his father's life; soon after the signing the articles *Thomas Baugh* was desirous of being off the bargain, but the defendant would not let him; so on the 3^d of *November* 1739. a lease and release was prepared by the defendant, (who is an attorney) and executed that day at his house when no body besides the defendant, his son, and another person, were present; *Thomas Baugh* among other things covenants that he is seised in fee, and there is a clause of warranty against *Rowland* and his heirs, and the use of a fine formerly levied by *Thomas* is declared to defendant in fee, and in consideration thereof he conveyed to *Thomas* the house at *Prestein*, but in that conveyance there is no such covenant or clause of warranty; the 1500 *l.* in money to be paid; the defendant makes out that he paid it thus, viz. that he paid off to *Lord Oxford* 550 *l.* owing to him by *Thomas* upon a mortgage of another estate (which was as much as the same was worth); 200 *l.* *Thomas* owed to defendant; 250 *l.* which defendant pretended he paid him in cash; and for the remaining 500 *l.* he gave *Thomas* a bond to pay it within a limited time after *Thomas Baugh* should have suffered a recovery to defendant's use.

Old *Rowland B.* died the 8th of *July* 1740. having lived no more than nine months after the making the articles, whereupon *Thomas* writes a letter to *Price* acquainting him with his father's death, and tells

tells him that he shall act in all respects agreeable to his wishes ; in another letter he tells *Price* he shall always act justly, and says that *Price* has got a good bargain of him, that he might afford to give him a *buck*, but says he shall not touch one without *Price's* consent.

After *this*, in Feb. 1740. *Thomas B.* filed his bill in Chancery to set aside these articles and conveyance and to be relieved, to the same effect as the present bill; the defendant *Price* put in his answer thereto, and denied the fraud charged.

Thomas B. being at that time indebted to *Price* in 100 l. which he was to give *Price* with his son as clerk to him, was threatened to be sued for it, and by other arts of *Price* was intimidated from proceeding in Chancery; nay *Price* was not content with *Thomas B.'s* stopping the proceedings in Chancery, but insisted upon some satisfaction to be made to him for the aspersions he pretended had been cast on him by that bill, and accordingly prevails upon *Thomas B.* to execute a deed dated October 1741. reciting the proceedings in Chancery, and that the purchase was a fair one, and *Thomas B.* thereby confirms and releases the estate to *Price*; soon afterwards *Thomas B.* and *Price*, with the assistance and intermediation of one *Doctor Thomas* (to whom *Thomas B.* applied) settled all accounts, and *Thomas Baugh* seemed so well satisfied that he thanked *Doctor Thomas* (who appears as a common friend to both) for his kindness. In 1743. *Thomas B.'s* bill in Chancery was dismissed and in 1746. he died. The present plaintiff his son soon after preferred this bill to be relieved upon paying the purchase money and interest to *Price*, and all necessary and permanent repairs.

At the hearing of the cause which lasted eight days, two questions were made; 1st, Whether the articles and conveyance were obtained by *fraud and imposition*; and 2^{dly}, If they were, whether *Thomas Baugh* by any subsequent act had purged that *fraud or imposition*. And after time taken to consider, the Barons were unanimously of opinion for the plaintiff upon both points, and gave their judgment *seriatim*.

Baron *Smythe*: There can be no doubt at all but as this case stood originally, and at the time it was depending in Chancery, that court would have relieved. Here is a son who is remainder-man in tail (in the life of his father old and infirm) not knowing the value of the estate, trafficking with an *attorney*, who had transacted business for his father and him 26 years, had seen the family settlement, and is taking advantage of the son's necessitous circumstances, and purchasing his estate for half the real value of it. *Price* draws all the writings himself, *Thomas B.* has no draught or copy, nor any attorney or counsel concerned for him; here is no valuation made of

the estate, the whole transaction kept a secret from old *Rowland*; *Price* seems to have made *Thomas B.* do just what he pleased, made him covenant that he was seised in fee, which *Price* knew he was not, makes him enter into a warranty; so that *Thomas B.* must certainly be guilty of a breach of covenant, for he was not seised in fee; and yet *Price* swears he only bought of him a remainder in tail, though *Thomas B.* has actually conveyed an absolute fee, and not a base fee or determinable, so that the articles and conveyance are fraudulent upon the face of them. Another fraud is the keeping back 500*l.* on the bond to be paid in a month after suffering a recovery; and if what *Price* says be true, that he only bought a remainder in tail, he had no right to oblige *Thomas B.* to suffer a recovery to bar the remainders over.

The 2d question is, whether the subsequent acts of *Thomas B.* will bar the plaintiff; and I am of opinion they will not, and that he ought to be relieved.

It is strongly insisted upon for the defendant that the letters from *Thomas B.* to defendant soon after his father's death, shew that he thought the bargain a fair one; but to this it is rightly answered, that they were written soon after his father's death, before his eyes were open, and before he knew the real value of the estate; for he not long afterwards preferred his bill in Chancery, and I think the arts and threats used by *Price* to stop *that* suit were as fraudulent as the original bargain, and the recital in the release executed thereupon is false, for the bargain was a very unfair one, and *suppressio veri*, or *suggestio falsi*, have always been held sufficient to set aside a release. 1 *Vern.* 20, 32. 1 *Wms.* 240. *Thomas Baugh* was made to think that his suit was without any good foundation, and to fear that he should be liable to costs, and if the purchase was at first fair it wanted no confirmation; *Thomas B.* was never fully apprized of his right, but was continued in a state of delusion by *Price* till his death, who imposed upon him in every transaction.

It was further objected for the defendant, that *Thomas B.* all his life, stood by and saw *Price* laying out great sums of money in repairs and ornamental additions, &c. But to this it is rightly answered that *Thomas B.*'s acquiescences were founded upon a mistake into which *Price* had led him. I think *Price* should be allowed for all necessary repairs; relief has been often granted in similar cases. 1 *Vern.* 167, 205, 237, 443. 2 *Vern.* 14. 1 *Wms.* 310.

The case of *Cole v. Gibbons*, 3 *Wms.* 290. was strongly relied upon by the defendants counsel; but *that* case differs very materially from *this*; *that* was not the case of an heir in the life of his father,

nor

nor of a remainder-man or reversioner, nor was there any fraud in the original bargain in *that* case upon which Lord *Talbot* laid great stress, the party *there* confirmed the bargain when he was fully apprised of every thing; but in this case at bar here is fraud in every transaction appearing by written evidence which cannot err, for *Thomas B.* was deluded from first to last; and in the case of Lord *Chesterfield* and *Jansen* stands quite clear of fraud, so nothing like this case.

It is the policy of the nation that such bargains as this should not stand; and if the cours of justice were to hold them good, it would be to encourage extravagance and disobedience in young heirs on one hand, and avarice, fraud and imposition on the other, and therefore I am of opinion that the articles and deeds ought to be set aside upon the plaintiff's paying the defendant his principal and interest, and that the defendant be allowed for all needful repairs, and that the plaintiff be paid his costs till this time, and that the subsequent costs be reserved till the coming *in* of the master's report.

N. The rest of the Barons delivered their opinions to the same effect, so there is no occasion to set them down; they said there was no instance where the original contract was fraudulent, that any subsequent act could purge it, and that, by stopping the suit in Chancery and the release thereupon given, the *fraud was double hatched*, and that the transaction was iniquitous from beginning to end. All the Barons held that *Thomas Baugh* was of sufficient age, and capable of transacting business; and though it was insisted for the plaintiff that *Thomas B.* was made drunk by *Price* at the time of executing the articles, yet *that* not being fully proved, it was laid quite out of the case, and he was considered as sober at the time. It was also said that *Price* had put Lord *Oxford* upon calling in his 550*l.* to distress *Thomas B.* but *that* was not proved, so was laid out of the case; but it appeared clearly *Thomas B.* was in necessitous circumstances.

Easter Term

25 Geo. 2. 1752.

Herbert *versus* Williamson. B. R.

Upon a trial
of a feigned
issue costs must
follow the
verdict, and
the court has
no discre-
tionary power
to give or not
to give costs.

WHILE an action of trespass was depending to try whether the *park and castle lands* were within the township of *Kendall* in that county of *Westmorland*, and so liable to be rated to the poor of that town, Doctor *Rotberam* the dissenting minister there, wrote a *pamphlet* to prove that the *park and castle lands* were within the township, whereupon the court was moved that an information might go against the *Doctor* and the *publisher*, upon an allegation that this pamphlet was written on purpose to influence the jury of the county of *Westmorland*; when they came to shew cause it was proposed and agreed by the counsel on both sides, and by the court, that it might be tried at *Lancaster* upon a *feigned issue*, whether the *park and castle lands* were within the township of *Kendall*; accordingly the cause was tried at *Lancaster*, and a verdict was found for the defendant that they were within the township. Upon the return of the *postea* the master refusing to tax costs upon this *feigned issue* which was come into by *consent*: therefore it was moved that the master might be obliged to tax defendant his costs.

And upon debating this matter by five counsel of a side, *Wright, Denison and Foster Justices* (*absente* C. Justice *Lee*,) were clear that the court in this case had no discretionary power as to costs, but that costs by law must follow the verdict, and that this matter is not a new question, but was determined in this court 1 *Annæ*, between *Still and Rogers*, where a *feigned action* was ordered to be tried at the assizes, upon an issue directed by this court upon a matter in the crown office, and there was a verdict for the plaintiff, and he had his costs. *Lilly's Abr.* 477. which book, *Wright Justice* said, was of authority in matters of practice; and upon search made in the office this is found to be so. *Nicholls v. Nicholls* was also a *feigned issue*, and costs followed the verdict; and this is always so when a *feigned issue* is directed by a court of law; but when an issue is directed by the court of Chancery then this court gives

gives *no costs*, but the finding of the jury is returned to the *Chancery*, and *costs there* are in the discretion of *that court*, because the *statutes* giving *costs* do not extend to *courts of equity* as they do to *courts of law*.

The Master was ordered to tax the defendant his costs.

Rex *versus* Johnson and five others. B. R.

THIS is an indictment which charges that the six defendants, together with several others, unlawfully assembled to disturb the peace of the King, upon the 22^d of August in the 24th year of King Geo. 2. with force and arms broke and entred the mine of J. B. and J. S. and unlawfully took and carried away — pounds of black lead, *contra pacem*, &c.

Indictment against six persons for entering a lead mine and carrying away lead, not quashed upon motion.

It was moved by Mr. Clayton that this indictment might be quashed, alledging that *this* was a mere action of *trover* or *trespass*, and not a matter of *public concern*; and cited *Rex v. Archer*, Hil. 11 Geo. 2. *Rex v. Man*, same term. Trin. 15 Geo. 2. *Rex v. Newsham*, and *Rex v. Dunn*, Pas. 17 Geo. 2. *Rex v. Gad or Guest*, Pas. 22 Geo. 2. *Rex v. Mason*, Hil. 11 Geo. 2.

On the other side it was said for the prosecutor, and resolved by the whole court, that the number of persons assembled together, differed this case from all the cases cited, and the defendants are not intitled to any indulgence from the court; and if the word *riot* had been in the indictment, it might have been easily proved, for this assembling was at a time in *Cumberland* when the Judges were trying other persons for the like offence at *Carlisle*; therefore the defendants may demur if they think fit, for it is in the discretion of the court, whether they will quash any indictment whatever upon motion.

Watson *qui tam versus* Jackson. B. R.

THIS was an action *qui tam* by a common informer upon the statute for killing game; Mr. Clayton moved for judgment as in case of a nonsuit, and obtained a rule for the informer to shew cause this term; no cause being now shewn, the rule was made absolute.

Judgment as in case of a nonsuit against an informer *qui tam* upon the game law.

Kenrick *versus* Taylor. B. R.

513 C 1

513 & 356

In an action for disturbing plaintiff in his pew, the plaintiff need not lay or prove that he repaired it against a stranger; aliter in a dispute with the ordinary.

THIS is a special action upon the case against the defendant for disturbing the plaintiff in his pew in the south isle of the church of *Wrexham* in the county of *Denbigh*, which he claims by prescription as appurtenant to his messuage in the parish; the declaration sets forth, that the plaintiff and all those whose estate he hath in the said messuage have time out of mind repaired the pew. Upon Not guilty pleaded, there was a verdict for the plaintiff, subject to the opinion of the court, upon a case which stated that at the trial there was no evidence given that the plaintiff, or any of the owners of the messuage, had ever repaired or been obliged to repair the pew, or that the pew had ever wanted repairing.

This case was argued in *Hilary term* 24 Geo. 2. by the Honourable Mr. *Bathurst* for the plaintiff, and Mr. *Moreton* for the defendant; and the single question was, whether the plaintiff can maintain this action without proving repairs done to the pew.

It was argued for the plaintiff that as this was an action by one in possession against a mere stranger, and wrong doer, that there was no necessity to prove any repairs; and that there was a great difference between an action against a stranger, and a contest with the ordinary in *prohibition*; for at common law the ordinary has the disposal of all the seats in the church, and although they be built and repaired at the charge of the whole parish, yet *that* will not oust him of his jurisdiction, and therefore a special title must be shewn against him by building or repairing the seat. 1 *Lev.* 71. Sir *Tho. Jones* 3, 4. but possession alone is sufficient to maintain this action against a stranger.

2 *Lev.* 241.
Salk. 551.
Comyns 7.

2 *Roll. Abr.*
288.
Hob. 69.
3 *Inft.* 207.
Comyns 3^d 6.
T. *Raym.* 52.

On the other side it was insisted that the church and seats are as free to all the parishioners as the market or highways, unless it can be shewn that any particular parishioner was placed in a certain seat by the authority of the ordinary, or built and has repaired it. And Lord *Hales* in a case like this at *Winchester* directed the jury to find for the defendant, because there was no proof that the plaintiff had ever repaired the seat. 1 *Sid.* 203.

Lee Ch. Justice, *Denison* and *Foster* Justices, inclined to think that the plaintiff had no occasion to prove repairs; but *Wright* Justice being inclined to think the contrary, time was to consider until this term, when the opinion of the whole court for the plaintiff was delivered by

Lee Ch. Justice : It is objected for the defendant that as repairs were laid in the declaration and not proved at the trial, the *posse* ought to be delivered to the defendant; but we are all of opinion that this being a *possessory* action against a stranger, and a mere wrong-doer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath; for it is a *rule in law* that one in possession need not shew any title or consideration for such possession against a wrong-doer.

But it is otherwise where one claims a pew or an isle in a church against the ordinary, who undoubtedly has *primâ facie* the disposal of all the seats in the church; and against him a title or consideration must be shewn in the declaration and proved, as the building or repairing, &c. And this is the true distinction. 3 *Lev.* 73.

The whole court were clearly of opinion that possession and laying it to be appurtenant to the house, without laying or proving that plaintiff repaired the pew, was sufficient against a mere stranger, and relied upon the case of *Burton v. Bateman*, 1 *Sid.* 203.

Judgment for the plaintiff.

Trinity

Trinity Term

25 & 26 Geo. 2. 1752.

Perkins, assignee of Hughes a bankrupt, *versus* Smith.
B. R.

6 mts 259.

Alexander v
Smith & Michael

254.

5 B & A 247.

6 B & A

G R B 448

Trover lies
against a ser-
vant who dis-
poses of goods
the property
of another to
his master's
use, whether
he has any
authority or
not from his
master for so
doing.

IN *trover*, the jury find a special verdict which in substance is shortly this. That upon the 22^d of September 1749. Hughes was possessed of the goods in the declaration as his own property, and became a bankrupt that day, that the plaintiff is assignee under the commission; that upon the 23^d of September 1749. the defendant Smith, who is servant and riding clerk to Mr. Garraway to whom the bankrupt was considerably indebted, went to the bankrupt's shop (to try to get his master's money) and found it shut up, and that the bankrupt delivered to Smith the goods in the declaration, who gave receipt for the same in the name of his master, and sold the same for his master's use.

It was objected that the action was improperly brought against the servant Smith, who acted wholly in this matter for his master, and that the *conversion* is found to be to the use of his master, which is the gist of an action of *trover*; after two arguments at the bar, the court gave judgment for the plaintiff.

Lee Chief Justice: The point is, whether the defendant is not a *tort-feasor*, for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.

Hughes the bankrupt had no right to deliver these goods to Smith; the gist of *trover* is the *detainer* or *disposal* of goods (which are the property of another) *wrongfully*; and it is found that the defendant himself *disposed* of them to his master's use, which his master could give him no authority to do; and this is a *conversion* in Smith, this *disposal* being his own *tortious* act; the act of *selling* the goods is the *conversion*, and whether to the use of himself, or another, it makes no difference; I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master before, or after the fact, can excuse him.

The

The finding that the defendant disposed of the goods for his *master's use* is only the conclusion of the jury, and does not bind the court, the taking upon him to *dispose* of another's property is the *tortious act*, and the *gist* of this action. Judgment for the plaintiff *per totam curiam*.

Rex *versus* Simmons a Jew. B. R.

THE Jew was indicted for putting into the pocket of one *Asb-ley* three *ducats*, with a malicious intent to charge him with felony, and was tried before Mr. Justice *Foster* at the last assizes for the county of *Essex*, and found guilty generally as to all the counts in the *indictment*.

644H. 366
New trial granted for the defendant in a criminal case, upon the report of the judge and affidavits of the jury that the verdict was taken contrary to their meaning, and to the judge's direction in point of law.

The court was moved for a new trial upon the *affidavits of all the twelve jurymen*, "that they only intended to find the defendant guilty of putting the *ducats* into *Asb-ley's* pocket, and did not intend, or understand that they had found him guilty of putting the *ducats* into his pocket *with an intent to charge him with felony*; and *Dodson* the foreman swears that he declared at the bar to the court when they brought in their verdict, *that they found the defendant guilty of putting the ducats in Asb-ley's pocket, but without any intent.*"

Mr. Justice *Foster* reported that after the evidence was gone through and summed up, the jury departed from the bar to consider of their verdict, and gave a private verdict at his lodgings that the defendant was guilty; the next morning they all appeared in court at the bar, and being asked if they stood by their former verdict, they answered they found the defendant guilty. That Mr. Justice *Foster* then told them that there were *four counts* in the indictment, and that the evidence for the King was only applicable to the *third*, which charged the defendant with maliciously putting three *ducats* into *Asb-ley's* pocket with an *intent to charge him with felony*; and told them that *the intent* was the principal thing to be considered by them, and that if they believed the defendant did not put the *ducats* into *Asb-ley's* pocket *with an intent to charge him with felony*, they must acquit him, whereupon the foreman at the bar said, "*We find him guilty of putting the ducats into his pocket without any intent.*" But by some mistake or misapprehension of the court, or the jury, or of both, a general verdict was taken that the defendant was guilty.

After this report the jury by further *affidavits* swear that there was a very great noise in court, and that when the judge directed them to acquit the defendant if they believed he did not put the

ducats into Ashley's pocket with an intent to charge him with felony, they did not hear or understand him.

This question having been debated by five or six counsel of each side, the court gave their opinion for a new trial.

Lee Chief Justice: There is no doubt but a *new trial* may be granted in a *criminal* case; and the true reason for granting new trials, is for the obtaining of justice; but to grant *them* upon the *affidavits of jurymen only*, must be admitted to be of dangerous consequence. It appears to me from the *report* of my *Brother*, and the *affidavits* of *Dodson the foreman*, that this *verdict* was taken by a mistake, for he swears that he declared in court "that they did not find the defendant guilty of any intent," and therefore this is not granting a new trial upon any *after-thought* of the jury, but upon what the *foreman Dodson* declared at the bar when they gave their verdict. I am very clear in my opinion there ought to be a *new trial*, and the rather, as this is a *criminal* matter.

Wright Justice: *New trials* are generally supposed to be more ancient than appears in the books, for want of reporters when they first began to be granted; every case of this kind must depend upon its particular circumstances; the jury, every man of them, come here and tell us that they were not understood, for that they declared at the bar they did not find the defendant guilty of *any intent*. My *Brother reports* that he told them if they did not believe the *intent*, they must acquit him; the jury now swear, "*they did not bear him*"; therefore I am of opinion it is a verdict *misentred*, contrary to the declaration of the *foreman*, not contradicted by any of the rest, at the time it was spoken at the bar; and that it is most plainly *no after-thought*, so that we may keep clear of the danger of granting *new trials* merely upon the *affidavits of jurymen*: I think this man has been convicted contrary to the judgment of his Peers, that he has not had *judicium parium*, and that we are bound to grant a *new trial*; and this being a *criminal* case is more to be favoured as to a new trial, than if it had been a *civil* case.

Denison Justice: The court will be very cautious how they grant *new trials* upon the *affidavits of jurymen*, because it would be of very dangerous tendency; but in this particular case, which partly depends upon my *Brother's report*, and partly upon the *affidavits of all the jurymen*, I am very well satisfied there ought to be a *new trial*, because it appears both by the *report* and *affidavits* that this *verdict* ought not to stand, and that the jury were mistaken in giving a *verdict* contrary to the direction of the judge; and that is what I principally go upon, that it is a *verdict contrary to the direction of the judge in a point of law*; one of the jury said, "*the defendant had*"

"no intent", then the judge said, "you must acquit him"; some of the jury swear they did not bear, others, that they did not understand the Judge.

Foster Justice: I am of the same opinion. I gave no direction at all in point of fact, only of law, that if they did not believe "the intent, they must acquit the defendant"; they told me they did not believe any intention; this is a verdict contrary to law.

New Trial granted upon payment of costs.

A common Soldier's Cafe. B. R.

HE was brought up by an *habeas corpus*, whereupon it was returned that he was committed by a justice of the peace as a vagrant, being charged by the overseers of the parish of Saint Ann Sobo as a rogue and a vagrant, and running away from his wife and one child, whereby they are become chargeable to the parish. There was also an *affidavit* wherein it was sworn on behalf of the parish, "that he was a watchmovement maker, and could earn 30 s. per week, and that he refused to maintain his wife and child."

A common soldier cannot be a vagrant within the meaning of the stat. 17 Geo. 2.

It was moved by Mr. Attorney General that he might be discharged upon an *affidavit* that he was a soldier, that he did not run away from Sobo, but was billeted at White Chapple when he was taken up; no body can say that the common soldiers of the army maintained and kept for the support of our liberties and property are rogues and vagabonds, or idle and disorderly persons within the stat. 17 Geo. 2.

Per curiam, He cannot be a vagrant within this act of parliament, so must be discharged.

Tempest versus Metcalf. B. R.

THREE feigned issues were directed by this court to be tried, and there was a verdict for the defendant upon the issue of the most material consequence; and for the plaintiff upon the others; and it was moved therefore that the plaintiff might have no costs; but *per curiam*, If any one issue be found for the plaintiff he must have his costs.

If any one issue be found for the plaintiff he must have his costs.

Rex

Rex *versus* The Bishop of St Asaph. B. R.

Attachment may issue against a peer, but for not returning a *fi. fa. de bonis ecclesiasticis*, it is proper to move against the chancellor, commissary or official.

MR. Nares moved for an *attachment* against the Bishop for not returning a *feri facias de bonis ecclesiasticis*

Per curiam, There is no doubt but an *attachment* may issue against a peer for refusing to obey the process of the court; but it seems the *chancellor, commissary or official*, are the proper persons to return these writs; and in *Michaelmas 6 Geo 1.* in the case of the *King v. Loggen, Chancellor to the Bishop of Salisbury* an attachment issued against him (the Chancellor) for not returning a *feri facias de bonis ecclesiasticis* against one *Jones Clerk*; therefore look into precedents.

Rex *versus* Collier and Cape. B. R.

5 B.C. 395

Judgment upon a conviction to be imprisoned for a month, to ask pardon and advertise it, the latter part is void.

THE defendants were indicted, tried and convicted at *Hick's Hall* for insulting Mr. *Smith* a justice of peace in the execution of his office at his house in *Ormond street*, found guilty and adjudged that they should be imprisoned for a month, and ask pardon of the justice at his house, and to advertise it in the *Daily Advertiser*. They having suffered a month's imprisonment, but not asked pardon or advertised, were now brought up by *habeas corpus*, and moved to be discharged.

Per curiam, So much of the judgment as is legal has been executed, and they must be discharged, for the other part of the judgment is void.

Rex *versus* The mayor and Burgesses of Oakhampton. B. R.

A father being a freeman of a borough is a good witness to prove the custom whereby his son is intitled to his freedom.

MANDAMUS to admit *J. S.* to his freedom, as being the eldest son of a freeman; they return there is no such custom, and that no man is intitled to his freedom but by *servitude*; this matter was traversed, and the question at the trial was, Whether by custom every person being the eldest son of a freeman born within the borough be intitled to be a freeman thereof; and the father of *J. S.* who had gained his freedom by *servitude* was called to prove the custom, but was refused to be admitted by the judge who tried the cause, and thereupon there was a *verdict* for the defendants.

It was now moved for a *new trial*, because the father ought to have been admitted to prove the custom. And

845. No such return as to this point was made - I have seen other copies of the return. J.D.

Per curiam, There is no reason to say the *father* should be refused, for he has no interest in the question, but rather comes to narrow his own interest which was gained by *servitude*; suppose a *legacy* be given to a *son*, surely the *father* may be admitted a *witness* to prove the will; the court were very clear, and granted a new trial.

Michaelmas Term

26 Geo. 2 1752.

Began upon the 6th of November by the late act of Parliament.

Grayson *versus* Atkinson. In Chancery, Nov. 7.

A Testator seised in fee by will expressed himself thus at the beginning thereof: "As to all my temporal estate where-
"with it hath pleased God to bless me, I give and devise
"the same as follows"; then gives several legacies to
A. and directs him to sell all or any part of his real and personal
estate for the payment of his debts and legacies, and desires three
persons to assist him in the sale thereof, and to be supervisors of his
will; and after giving some legacies to others, concludes his will
with this *residuary devise*, viz. "As to all the rest of my goods and
"chattels real and personal, moveable and immoveable, as houses,
"gardens, tenements, my share in the copperas works, &c. I
"give to the said *A.*" without making use of the word *estate*, or
any words of limitation whatever.

Devise.
As to my
temporal e-
state I dispose
thereof as
follows, &c.
and after-
ward says, All
the rest of my
goods and
chattels real
and personal,
moveable and
immoveable,
as houses, te-
nements, &c.
without the
word estate,
or other
words of li-
mitation,
passes a fee.

The question now is, what estate or interest *A.* took in the real estate by this will.

Lord *Hardwicke* Chancellor: I doubted at first, but now am clearly of opinion, (as the testator had a *fee*,) that *A.* takes a *fee*; there is no doubt but the testator when he says, "As to all my tem-
"poral estate, &c. in the beginning of his will, he intended thereby

to dispose of *all* the estate he had in the world, both with regard to the *quantity* and *quality* thereof. 2dly, There is no doubt but the inheritance is charged with his debts and legacies; and the word *temporal* is here put in opposition to his *eternal* or *spiritual* concerns, agreeable to Lord Talbot's construction in the case of and does not mean a life estate or term of years, but as if he had said, "*All my worldly estate*. Yet I do not say but that notwithstanding these words he might afterwards have qualified them, and made more particular, limited, or partial dispositions of his estate, for *intention* at first is one thing, and the *execution* of that intention is another.

It appears that he had it in view to dispose of the *whole* when he directs, that *all* or *any part* of his estate should be sold, for it is possible the debts and legacies might exhaust the whole; and though there is not the word *estate*, nor any words of limitation in this residuary devise, yet *A.* takes a *fee* thereby; for what is the word *rest* to relate to but to his temporal estate, which he was disposing of; for he says, "As to the rest of my goods and chattels real and personal, moveable and immoveable, as houses, gardens, tenements, &c. I give them to *A.*" He has here explained by the words, *as houses gardens, tenements, &c.* what he meant by his *goods and chattels real and personal, moveable and immoveable*, but if he had not so explained himself, I do not think that the words *goods and chattels real and personal, moveable and immoveable*, would have carried the *lands* by the *law of England*, though they might have so done by the *civil law*; and the word *as* is as much as if he had said, *I mean*, for a man is not confined to make use of *legal technical words* in his will, but may use what words he pleases provided he explains his meaning clearly. *All the rest, &c.* plainly relates to something mentioned before, and *that* mentioned before, *which* he was about to dispose of, was *all his temporal estate*, which passes a *fee*, when the testator has one. *Vide 2 Vern. 690. 3 Peere Wms. 295. 1 Salk. 234.*

Elliot *versus* Lane. B. R.

7/12/800
Sci. fa. against bail, who pleads there was no ca. fa. against the principal; replication there was; rejoinder that it did not lie four days in the sheriff's office, this is a departure.

SCIRE *facias* upon a recognizance of bail; the defendant pleads that the *venue* is in the county of *Southampton*, and the bail was acknowledged in *Middlesex*, and that no *capias ad satisfaciendum* was taken out against the principal defendant; the plaintiff replies, there was a *ca. fa.* issued and returned *non est inventus*; the defendant rejoins that the *ca. fa.* did not lay four days in the sheriff's office. Demurrer. It was objected for the plaintiff that the defen-

dant's

defendant's rejoinder was a *departure* from his plea; for in his plea he says there was no *ca. sa.* and in his rejoinder admits there was a *ca. sa.* but that it did not lay four days in the office. The court was of opinion that this is clearly a *departure*, and gave judgment for the plaintiff.

Cited pro
def. 2 Salk.
599.

Emerfon *versus* Hawkins and others. B. R.

THE plaintiff makes an *affidavit*, "that the defendants are indebted to him in 103*l.* for goods of the plaintiff, which the defendants have converted to their own use"; upon this *affidavit* the defendants are arrested, and it is now moved by the *Attorney and Solicitor General* that the defendants may be discharged out of custody upon *common bail*, on an *affidavit* that the defendants are Custom-house officers, and seised the goods as prohibited and uncustomed goods which are now in the King's warehouse, and that a prosecution is now carrying on in the court of *Exchequer* in order that they may be either *condemned*, or that a *writ of delivery* may issue in case they have been unlawfully seised.

Affidavit that defendant is indebted to plaintiff in 103*l.* for goods which defendant converted to his own use. is sufficient to hold a custom-house officer to bail in *trover*, and no *affidavit* can be received to explain or contradict the plaintiff's oath.

Mr. Ford for the plaintiff: The *affidavit* of the plaintiff is positive to a debt, and the court cannot now receive any *affidavit* to contradict or explain it; and this is not like the cases in the *Common Pleas*, where the whole circumstances of the seizure appeared in the *affidavits* to hold to bail; to grant this motion would be to try the cause on *affidavits*, and there would be the same reason for doing so in every case where the defendant can justify; as if a plaintiff swears to his debt, the defendant might come and swear, it is true I owe the debt, but the statute of limitations has run, so pray discharge me upon common bail.

Attorney General: The officers have seised for the benefit of the crown, and the goods are now (as it were) in the custody of the law, and if the plaintiff has a right to them he is in no danger of losing them; they are now out of the power of the defendant, and if officers of the revenue be liable to arrests in these cases it will be a great inconvenience.

Lee Chief Justice: The plaintiff having sworn positively that the defendants are *indebted*, in order to hold them to *bail*, it is the known course of the court that we cannot receive any *affidavit* to explain or contradict the plaintiff's oath; even an *affidavit* of the plaintiff's confession that a defendant owes him nothing cannot be received, and the court have determined that the plaintiff may hold the defendant to bail in *trover*, which is as certain as goods sold; and though the *affidavit* swears that the defendants are *indebted*, it

is well enough, because the value of the goods is ascertained thereby, and though it may be inconvenient to these officers, yet there would be ten times more inconvenience if we were try whether plaintiff swears true: they took nothing by the motion.

Griffith *versus* Walker, Esq; Sheriff of Radnorshire.
B. R.

Action against the sheriff for a false return is transitory, for he may make and deliver his return any where, and that which is false is universally so.

SPECIAL action upon the case against the sheriff of the county of *Radnor* for a false return of a *scire facias* issued out of the court of *Exchequer* against the plaintiff; whereupon the defendant returned a *scire feci*; and the plaintiff avers that the defendant did not give him notice, by reason whereof an execution was awarded, and the plaintiff's goods were taken in execution to the plaintiff's damage; this action is laid in the county of *Hereford*, and the fact alledged is, that the sheriff made this return at *Kington* in that county.

The defendant demurs, and shews for cause of demurrer that the return is alledged to be made by the sheriff of *Radnor* in the county of *Hereford*.

It was argued for the defendant that this is a *local action*, and ought to have been laid in the county of *Radnor*, because whatever acts the sheriff does in his office must be done in his own county, or at least the law supposes he does such acts *there*; and 2 *Salk.* 669. was cited as in point to shew that this kind of action must be laid either in *Middlesex*, where the return is filed, or in the county where it is made.

E contra, It was argued for the plaintiff that the question is not, whether the sheriff can execute a writ, or summon the party out of his county, but whether he cannot make the return in any other county, and it was insisted upon, that he may; it was compared to an action against the sheriff for an *escape* which may be laid in any county in *England*, for an escape in one county is an escape every where. The ordinary may grant administration out of his diocese. *Godb.* 33. and a justice of peace may take an examination as to a robbery out of his county. *Cro. Car.* 211, 212.

2 *Ld. Raym.*
1455.

Lee Chief Justice: It is certain the sheriff may indorse his return upon a writ any where; it is laid here, that he did this, and delivered the writ of *scire facias* at *Kington* in *Herefordshire*, and for any thing we know the fact was really done *there*, and the plaintiff has his election to lay his action where he can prove the fact done; and the case of the *Ordinary*, *Godb.* 33. and of the justice of peace.

Hob. 209.
Noy 22.
1 *Mod.* 198.

Cro. Car. 211, 212. are very material in point. The falsity of the return is the cause of action, and that which is *wrong* is *so* universally and every where, like an *escape*. *Plowd.* 37. *b.* *Styl.* 107. And if the plaintiff had undertaken to give evidence that the sheriff delivered the writ in *Herefordshire*, this court would not have changed the *venue*, if there be matter of *law* or *record* and matter in *pais* in different counties, the plaintiff has his *election* to lay his action in which of the counties he pleases; Judgment for the plaintiff *per totam curiam*.

Jones *versus* Tub. In Error. B. R.

DIGHTON and another became bail for the plaintiff in error, Dighton being excepted to, did not justify in court, and so one Sleeper was added a bail in his stead and justified; Dighton did not apply to the court to have his name struck out of the *bail-piece* as he might have done, and afterwards Sleeper becoming insolvent, the defendants would have had recourse to fix Dighton with the debt, and therefore it was now moved on the behalf of Dighton that his name might be struck out of the *bail-piece*, which was granted *per totam curiam*; for as he was excepted against and refused to justify, he might reasonably think he was no longer bail, and so did not move to have his name struck out *before*.

Bail in error who refuses to justify may have his name struck out of the bail piece at any time.

Daubers *versus* Pender. In Error.

THIS was a transcript of a record in error from an inferior court, wherein there was a mistake, and therefore it was now moved for leave to amend the transcript by the record below upon payment of costs, because *diminution* cannot be alledged in a record in error from a *base court*; and although it was objected that it does not appear to the court that the record below is right, yet *per curiam*, This has been often done, and the rule in *Reed and Chamley*, *Pas. 4 Annæ*, was produced and read, which runs thus. *Pascha 4 Annæ. Sabbati prox' post crastinum assensionis Domini. Read and Chamley. Ordinatum est quod referatur magistro Clark et quod ipse in presentia attornatorum ambarum partiū emendet recordum brevi de errore annexum secundum separales processus in curia inferiore habitos, coram ipso per partes prædictas producend'. Ex motione Jacobi Montague militis.*

Transcript of a record in error from a base court ordered to be amended by the record below to be produced before the Master.

And Lee Ch. Justice said he remembered an amendment made upon his own motion, by the minutes of the books of a corporation court of record in the time of Lord Ch. Justice Parker, and the books were produced before the Master.

Griffith *versus* Williams. B. R.

Traverse.
Trespas: de-
fendant justifies under a prescriptive right to a duty called *tenfary*, and to the like right to distrain for it; the plaintiff traverses the right to the duty, without traversing the right to distrain, and held good.

TRESPASS for entering the plaintiff's house, and taking and carrying away a *gold ring*. Defendant pleads Not guilty, and a special justification, that plaintiff has an house, and is an inhabitant in the town of *Ofwestry*, which is a corporation by prescription by the name of mayor, aldermen, and common council; that there is a prison within the corporation which has been used to be repaired time out of mind by the corporation, and that for time out of mind they have been used to rate and take of every inhabitant, not being a burghers, a certain rate called a *tenfary* towards the repairing the prison, and prescribe also that they have been used to distrain for this rate or duty when refused to be paid; that the plaintiff was rated, and refused to pay the duty, and therefore the defendants, as officers of the corporation, justify the taking the *ring*, and the *trespas*; this is pleaded two other ways with little variation.

The plaintiff replies that the defendants are guilty of a trespass of their own wrong; *absque hoc* that the corporation for time out of mind have been used to rate and take of every inhabitant not being a burghers a certain rate called a *tenfary*. There are the like replications to the other pleas. The defendant demurs, and shews for cause that the plaintiff has only traversed the *prescription for the duty*, and not the *right to distrain for it*.

This case was argued twice at the bar, and it was objected for the defendants that the replication is ill, because the plaintiff has only traversed the *right to the duty*, and not the *right to distrain for it*; and if an issue had been taken upon this *traverse* it would not have made a final end between the parties; for suppose an issue had been taken and found for the defendant, it would have been only saying that the defendant had a *right to the duty*, but not that he had any *right to distrain for it*; indeed if a *verdict* had been found for the plaintiff it would have made an end between the parties, but if for the defendant, there must have been a *repleader*. *Comyns*. 148. If the *right to distrain* had been put in issue, it would have made an end.

On the other side for the plaintiff it was insisted that if the defendant's plea be false in *any* material fact, the *whole* falls to the ground, and *that* part of the justification which is not traversed or denied is admitted; so that if there had been a verdict for the defendant upon the issue tendred, it must have been taken upon this record, that the defendant would have a *right to distrain*, because *that* is not traversed or denied by the plaintiff.

The

The three material facts in the defendants plea, are, The *consideration* for this duty, the *duty* itself, and the *right to distrain* for it; and it would have been sufficient to have put any one of these in issue; and it does not lay in the defendant's mouth to complain that the plaintiff has not put all the prescription in issue, for he has less to prove; the use of pleading is to avoid prolixity, and to prevent judges and juries from being troubled with unnecessary matter. *Co. Lit.* 126, 303.

Some exceptions were taken to the plea, and the custom; but the *whole court* were of opinion that the *traverse* was well enough, they determined nothing concerning the plea, but seemed to think that such a custom could not be supported. *Denison* Justice said; Suppose a man claims a right to common *pur cause de vicinage* in *A.* and *B.* it was never doubted but a *traverse* of the right in *A.* would be sufficient without traversing *his right* in *B.*

Judgment for the plaintiff.

Kelly *versus* Devereux. B. R.

THE *affidavit* for holding the defendant to *bail* is made by a third person, who swears "that the defendant is indebted to the plaintiff in a certain sum of money, as appears by a bottomry bond in the deponent's custody, and that the defendant on such a day acknowledged the debt to him, and promised to pay the same to the deponent who has authority from the plaintiff by letter of attorney to receive the same"; it was moved by Mr. *Hume* that the defendant might be discharged out of custody upon *common bail*, for want of a *positive affidavit* of the debt. Common bail allowed for want of a positive affidavit of the debt. See ante 121, 231, 232.

For the plaintiff, who was abroad, it was insisted that a more *positive affidavit* than the *present* cannot be made in a case where the plaintiff is abroad, for here is the defendant's confession and promise to pay; and in cases of executors and administrators a more *positive affidavit* cannot be made.

But *per curiam*, There must be a *positive affidavit* of a subsisting debt at the time of making the affidavit and suing forth the writ, and the want thereof cannot be supplied afterward; and in the case of an administrator, who swore to a debt as it appeared by the books of the intestate, it was held insufficient to hold to bail. Mr. *Pratt* for the plaintiff.

Defendant discharged upon common bail.

Rex *versus* Rook. B. R.

52 & 100

Baron and
feme.
The feme
may be ad-
mitted to
prove the fact
of adultery
with her, but
not to prove
the baron had
no access.

AN order of *bastardy* was made that the defendant should pay 20 s. and 1 s. 6 d. *per week* to the overseers of the poor of the parish of *Kirby Moorside* in *Yorkshire* towards the maintenance of a *bastard child*, upon the oath of a married woman alone, who swore that her husband was in gaol long before she was got with the *bastard child*, and ever since, and that *she* had no access to *him* nor *he* to *her*, and that *Rook* begot the *bastard*.

And now it was objected by Serjeant *Agar* that the order ought to be quashed, because a wife cannot be admitted to prove that her husband had no access to her.

And so it was ruled by the whole court; and they cited the *King* and *Reading* in *Michaelmas and Hilary* 8 Geo. 2. where Lord *Hardwicke* said that although a wife might be admitted to prove the fact of *adultery*, yet she shall not be admitted to prove that her husband had no access, because that may be proved by other persons, and an order of *bastardy* could not therefore be made upon her oath alone.

2 Stra. 1076,
925.

The case of the *King* and *The parish of Bedall* differs from this, for there were witnesses to prove the husband had no access; *Per curiam*, As the justices have determined solely upon the evidence of a wife, the order must be quashed.

Hilary

Hilary Term

26 Geo. 2. 1753.

Goodtitle of the demise of Hood *versus* Stokes. B. R.

IN ejectment for lands in the county of *Warwick* tried in 1751. the following case was made for the judgment of the court :

These words
"equally to
be divided" in
a deed of uses
make a tenancy in com-
mon.

John Gurl being seised in fee of the freehold lands in question, by lease and release of the 6th and 7th of December 1695. granted and conveyed the same to trustees, to the use of himself and his wife for life, and for the life of the longer liver of them, remainder to the use of their children begotten between them in such shares and proportion, and for such estate and estates, as the said *John Gurl* should by his deed or will appoint; and for default of such appointment, then to the use of all and every of the children of the said *John Gurl* and their heirs equally to be divided amongst them.

John Gurl died without making any appointment, leaving four children; and the single question is whether by the words *equally to be divided amongst them*, they shall take as tenants in common, or as jointenants.

This case was learnedly argued, for the plaintiff in *Easter* term last * by *John Eardley Wilmot* for the plaintiff, and *John Ford* for the defendant; and again in *Michaelmas* term last by Mr. *Knowler* for the plaintiff, and Mr. *Hume* for the defendant, and

* Lord Ch.
Just. of the
Common
Pleas when
this work
was published
ed.

After time taken to consider till this term, *Lee* Chief Justice delivered the unanimous opinion of the whole court: That this being a deed of uses must be construed according to the intent of the parties, which most plainly is, that the children should take *in common*; and they relied upon the case of *Fisher and Wigg*, 1 *Salk.* 391. where the same point was determined in the case of a copyhold surrendered to the use of *A. B.* and *C.* and their heirs equally to be divided between them and their heirs, and was held by *Turton* and *Gould* justices, *contra Holt*, to be a tenancy *in common*, and judgment was given accordingly, which (*Lee* Ch. J. said) was never reversed notwithstanding what is said in the case of *Stringer and Phillip*,

Eq. Ca. Abr. 291. in the marginal note; they also cited the case of *Rigden and Valere* before the Lord Chancellor *March* 25, 1751. which was thus: *G. E.* by deed of the 5th of *August* 1710. in consideration of love and affection to his wife and children, covenanted to stand seized to the use of his wife for life, and after her decease, to the use of his two daughters and their heirs equally to be divided between them; one of the daughters made her will, and the question was, whether this was a *jointtenancy* or a *tenancy in common*. My Lord Chancellor gave his opinion that it was *in common*; after he had taken time to consider, he said he had well considered the case, and that after he had delivered his opinion, if the parties were dissatisfied with it, he would send it to this court to be argued. Lord Chancellor said: "It is settled that the words *equally to be divided*" "in a *will* do create a *tenancy in common*; the word *equally* of itself; "or the words *Share and share alike*, will do the same"; but it is objected it must be taken otherwise in a *deed*; now I know of no solemn determination that these words will not make a *tenancy in common* even in a *deed*; the principal case as to this point is *Fisher v. Wigg*, which was said at the bar to be a doubtful authority, and that the judgment was said to be reversed; but there never was any reversal of it, or writ of error brought, and therefore it is an authority as to a surrender of copyhold lands; and the anonymous case in 2 *Vent.* 365. is directly in point to the present case, and upon the best consideration of this question, I am inclined to think that these words, "*equally to be divided*", be they in a *will* or *deed*, will make a *tenancy in common*, to say otherwise would be to contradict the intent of the parties; I have the great opinion of *Holt* against me, but *that* of the two Judges against him has more of natural justice and reason in it, though *Holt's* has more of refined legal learning; Justice *Gould's* argument is an extraordinary good one, and is not answered to my satisfaction. The Attorney General was satisfied with the Lord Chancellor's opinion, and there was a decree accordingly; and upon these authorities this court gave judgment in the case at bar, that the words *equally to be divided* in a deed of uses create a *tenancy in common*.

February 3, 1753. in this term, the reporter was called to the degree of Serjeant at law.

The END of the FIRST PART

Hilary Term

26 Geo. 2. 1753.

Stevens of the demise of Wife *versus* Tyrell. C. B.

3 Adm. 265

IN an ejectment of copyhold lands this case was reserved at the assises for the opinion of the court, which states, That *J. Jennings* being seised in fee according to the custom of the manor of the copyhold lands in question died, and the same descended to his heir at law *Frances* the wife of *William Geary*, subject to *J. Jennings*'s widow *Henrietta*'s estate; that *Frances* the wife of *William Geary* was admitted, and being solely examined, surrendered the premises to the use of herself for life, remainder to *Henry Wise* in fee; and that *William Geary* her husband then living did not join with her, that *Henry Wise* was admitted to the remainder in fee, that *William Geary* died in 1739. and *Henrietta* the widow is also dead, and that there is a custom in this manor that a feme covert seised in fee of copyhold lands may dispose of her estate without her husband's joining. A verdict was taken for the plaintiff, who claims under the sole surrender of *Frances* the feme covert, which is void if the custom be not a good one.

A custom for a feme covert to surrender her copyhold lands without the assent of her husband is bad.

After several arguments, the whole court were clearly of opinion that this was a bad custom; and *Willes* Lord Chief Justice in giving the judgment of the court said, that Justice *Burnett* (who was now lately dead) was of the same opinion.

It is not stated whether the feme covert by the custom was to be solely and secretly examined, though in fact she was so; nor is it stated that the husband by the custom was to consent though he did not join, and therefore it must be taken for granted he did not consent.

In support of the custom was cited 2 *Danv. Abr.* 430. *pl.* 10. where it is said that it is a good custom in a copyhold manor, that a feme covert, *with or without the consent* of her husband, may devise her copyhold lands to her husband, or whom she pleases; but this

PART II.

B

is

is not rightly abridged, and shews what little credit ought to be given to abridgments; the case abridged is anonymous in *Moor* 123. pl. 268. and the custom there found on a special verdict is, that a feme covert *with the assent* of her husband may devise her copyhold lands to her husband or any other, which the court thought was not an unreasonable custom; but that is not the present case, which must be taken to be without the assent of the husband.

Dyer 363. b.
Davis 30.
50. b.

3 Leon. 81.
Godb. 143.

It was said, that if a feme covert levies a fine it shall bind her and her heirs, if the husband does not enter and avoid the estate of the conusee, because she was examined, and had power over the land, 10 Rep. 43. a. But the reason given in *Hob.* 225. is, that she is estopped to say she was covert; and a fine levied by a feme covert of freehold lands was compared to a surrender by her in fee of copyhold lands intailed, whereof no fine can be levied, and which would bar the issue; and this at first seemed to have some weight with the court; but at length they resolved that this custom cannot be supposed to have had any reasonable commencement, that it is contrary to law and the policy of the nation, and tends to make wives independent of their husbands; that no tolerable reason was given at the bar for this custom. And the verdict was set aside, and judgment given for defendant, the heir at law of *Frances* the wife of *William Geary*.

Watson Demandant *et* Lockley Tenant. C. B.

Recovery a-
mended in the
return of the
writ of seisin,

THE writ of seisin upon a common recovery was tested *secundo die Junii anno 13 Georgii*, returnable *tres Trin.* The return made by the sheriff was thus, "*Virtute istius brevis mibi directi duodecimo die Junii anno infrascripto habere feci infranominato Willielmo Watson plenariam seisinam de acris infrascriptis cum pertinentiis prout interius mibi præcipitur Johannes Lock Miles, & Willielmus Ogborne Miles Vicecomes Middlesexia.*" Now the words *anno infrascripto* refer to the teste of the writ, which was in the 13th year of K. Geo. 1. but the 12th of June was in the first year of his present Majesty; so the court, upon reading the writ and the return, ordered the year to be amended as a misprision of the clerk without any rule to shew cause.

Easter

Easter Term

26 Geo. 2. 1753.

Roberts *versus* Pierfon. C. B.

THE plaintiff who is a married woman entred into a bond as security for the defendant for 100*l.* and by way of counter security the defendant executed a bond and warrant of attorney to confess judgment to her; she having been obliged to pay 50*l.* for the defendant, has entred up the judgment upon the warrant of attorney and taken out execution thereupon; it was now moved to set the judgment aside, and to have the money paid into the hands of the sheriff restored to the defendant.

A judgment confessed to a feme covert is void, and so is her bond.

Per Curiam, A judgment at the suit of a feme covert is void, and so is her bond, and the money she paid for the defendant was her husband's, and he may sue for it; so the judgment must be set aside, and the money in the sheriff's hands restored.

Whereupon the parties compromised the matter, and a rule was entered into by consent that no action should be brought on either side.

Scott *versus* Dixon & al'. C. B.

1122668

ACTION of assault and false imprisonment. The defendant pleads Not guilty as to all the trespasss in the declaration except the assault, imprisonment and detaining the plaintiff in prison, and as to that he pleads that *Dinab Scott* sued out of this court a writ of *capias ad respondendum*, directed to the sheriff of *Cumberland* to take *Jonathan Scott* (the now plaintiff) to answer *Dinab Scott* in a plea of trespasss, and also of a plea of trespasss upon the case upon promises, &c. which writ was delivered to the sheriff, who made a warrant thereupon to two of the defendants *James* and *William Scott*, and the other defendant *Dixon* (who is the keeper of the county gaol) assisted, which is the same assault and imprisonment complained of.

Assault and imprisonment. Defendant justifies under a *capias ad respondendum*. Plaintiff replies the defendant released him from the arrest and afterwards arrested him; and prays judgment because the defendant

has acknowledged the trespasss; this is naught, and the plaintiff ought to have made a new assignment.

The plaintiff replies, and admits the process issued to the sheriff of *Cumberland*, and that he made a warrant thereupon directed to two of the defendants, who arrested the plaintiff thereby, and delivered him to the other defendant *Dixon* the gaoler, who released him from the arrest, and permitted him to go at large out of his custody, and that afterwards the defendants took him again; wherefore, as the defendants have acknowledged the said assault and imprisonment, he prays judgment and his damages; defendant demurs generally, and plaintiff joins in demurrer.

It was objected for the defendants, that the replication was bad, because it does not confess and avoid, nor traverse the material facts in the defendant's plea, which is a compleat justification of the assault and imprisonment in the declaration, which facts are all admitted, and none of them denied or avoided; and if there were two assaults and imprisonment, the plaintiff ought to have made a new assignment; as in trespasss where the defendant justifies under a licence for the putting in of his cattle into the plaintiff's close, the plaintiff may come and reply that it is very true I did licence you at the time you say, but you put in your cattle at another time without my leave, which must be answered by a justification, or Not guilty; so in the case of a way.

For the plaintiff it was said that the replication was well enough, and the defendant might have denied that he permitted the plaintiff to go at large after the arrest, and a new assignment is not necessary; but if it is, it ought to have been shewn for special cause of demurrer.

In reply for the defendant it was said, if he had taken Issue upon the latter part of the replication, it would have been a departure.

Curia: The defendant's plea is a compleat answer to, and justification of, the trespasss, assault and imprisonment laid in the declaration, which the plaintiff has admitted to be true: now if there was any assault and imprisonment besides that which is justified, the plaintiff ought to have set it forth by way of new assignment; but instead of doing so, he has only said that the defendant *Dixon* the gaoler discharged him from the arrest, and the defendants afterwards took him; wherefore inasmuch as the said defendant has acknowledged the said trespasss, he prays judgment and his damages: Now it is most plain the trespasss acknowledged is the trespasss in the declaration, which has been fully justified by the plea; and therefore it is absurd for the plaintiff to pray judgment of the trespasss acknowledged, seeing the defendant has confessed, and avoided it. And they inclined to give judgment for the defendant, because they thought

Cro. Car. 228.

thought the replication was naught for want of a novel assignment
Sed adjournatur.

Serjeant *Poole* for the defendant, Serjeant *Wynne* for the plaintiff.

Adams *versus* Freeman. B. R.

Sayer M. S. C.

ASSAULT and imprisonment; defendant justifies under a *capias* issued out of a base court in an action of debt, and shews that a plaint was levied, & *taliter processum fuit* that a *capias* issued, &c. plaintiff demurs; and it was objected that the plea was naught, because it does not appear that any summons issued before the *capias*; *Sed per totam curiam, taliter processum fuit* that a *capias* issued is well enough, and we will suppose every thing regular below. Judgment for the defendant.

Imprisonment; defendant justifies under a *capias* in debt in a base court, without shewing any summons, and well enough.
 Ante Murray and Wilson.

Miller Page 39. note

Cooke & al.' *versus* Pettit. C. B.

DEBT upon a bond brought by the plaintiffs as churchwardens of the parish of *A*. The defendant craves *oyer* of the bond, and sets out the condition, which is that if he keeps the parish harmless, and maintain a certain bastard child, then the obligation to be void, otherwise to remain in force; and then pleads *non damnificatus*. The plaintiffs reply that the defendant did not provide for and maintain the child from such a day till such a day, and that the parish have been obliged to pay 5*l.* to maintain the child during that time; and this they are ready to verify; wherefore they pray judgment. Rejoinder that the defendant provided for the child during that time; and issue thereupon, which was found for the plaintiffs. And in arrest of judgment it was objected for the defendant, that it does not appear upon the record that the child was born in the parish of *A*. and therefore the parish is not chargeable, and could not be damnified; and cited 2 *Saund.* 80. *Richards & al' versus Hodges*, where it appears on the record in that case that the bastard child was born in the parish: and it was said that orders of bastardy are frequently quashed in *B. R.* when they do not state that the child was born in the parish.

Debt upon a bond to save the parish harmless from keeping a bastard child. Plea, Non damnificatus. Replication plaintiffs paid 5*l.* to keep the child from such a time to such a time. Rejoinder that defendant maintained it for that time; issue and verdict for plaintiff. Objected it does not appear the child was born in the parish, but over-ruled.

To this it was answered, that it appears upon the record that the plaintiffs are churchwardens of the parish of *A*. and the court will intend that it was proved at the trial that the bastard child was born in the parish of *A*. And of that opinion was Justice *Gundry* (only in court), and gave judgment for the plaintiffs.

PART II.

C

Then

Cannot be referred to compute how much the parish is damnified.

Then it was moved that it might be referred to the prothonotary to adjust how much the parish was damnified, the penalty of the bond being 200*l*. But *per* (J. Gundry) *curiam*, this is not a case within the *stat. 3 & 5 Ann.* and we cannot hinder the plaintiffs from taking out execution for the penalty.

Serjeant *Poole* for the plaintiffs, Serjeant *Agar* for the defendants.

Boughton *versus* Chaffey & al. C. B.

Bail, practice.

CURIA: We have determined over and over again that the plaintiff may except to the bail above, though they are the same persons that became bound to the sheriff for the defendant's appearance; and that the defendant cannot move to stay proceedings on the bail-bond, before he has put in, and justified bail in the original action.

Trinity Term

26 & 27 Geo. 2. 1753.

3 April 1753

2 B & C 667

Goodtitle of the demise of Pearson *versus* Otway. C. B.

Devise to one for life, and after to her issue, and if she has no issue, power to dispose thereof at her will and pleasure; the contingency of issue never happened, she took a fee

IN ejectment. The case was, testator being seised in fee of the lands in question, gave and devised the same by his will to *Agnes Pearson* (who was his heir at law) for and during her life, to be enjoyed by her without molestation, and after her death to her lawful issue, and if she shall have no issue, that she shall have power to dispose thereof at her will and pleasure; the testator died and *Agnes Pearson* entred; that she was the testator's heir at law, and married the defendant *Otway*, and during her coverture made her will, and devised the premises to her husband *Nicholas Otway* for his life, if he continued single and a widower, if not, over, and died without issue.

The

The lessor of the plaintiff claims as heir at law to *Agnes*, and defendant claims under her will: the question therefore is, whether *Agnes* had an estate in fee either as heir at law, or by the will; or had only a power or authority to dispose or appoint; if she had an estate in fee she could not make a will during her coverture, if she had only an authority she might execute it while covert, was admitted on all hands.

After argument at the bar the whole court was clearly of opinion that *Agnes* had an estate in fee-simple by the will, as the contingent remainder to the issue never vested; that the testator by giving her power to dispose thereof at her will and pleasure, in case she had no issue, has given her a fee-simple, according to what is said by Serjeant *Sbuttleworth* in 1 *Leon.* 283. where the words are the same as here; but supposing these words did not carry a fee-simple, yet as she was heir at law, the fee descended to her upon the death of the testator, and she having no issue, it was never out of her.

Against this opinion was cited 3 *Leon.* 71. where the like devise was only held to be an estate for life, with authority to dispose of the reversion; but the court said that case was not law, and that the case in 1 *Leon.* 283. was determined after that in 3 *Leon.* 71.

The word *issue* in a will is always a word of limitation, and makes an estate-tail; and so does the word *children* if there are none in being at the time of the devise, and is a word of limitation; but if there are children in existence, then it is a word of purchase.

Gundry J. said *Agnes* took an estate-tail and a fee upon contingency by the will, and had a fee by descent; *King versus Melling*, 2 *Lev.* 58. in point; and *Shaw versus Weigh* carried it much farther, 2 *Stra.* 798. Judgment for the plaintiff.

Thrustout *versus* Bedwell. C. B.

THE lessor of the plaintiff died before the commission-day of the assises; the cause was called on, and the plaintiff was nonsuited because the defendant did not confess lease, entry and ouster; and now it was moved on behalf of the executor of the plaintiff's lessor, that the suit did not abate by the lessor's death after issue joined and before the trial, and that the prothonotary might tax and allow the executor his costs upon the common consent rule, and have no costs taxed on the common rule.

On

8 Trinity Term 26 & 27 Geo. 2. 1753.

On the other side it was insisted that the executor is not intitled to costs upon the rule, it being merely personal; and if there had been a verdict for the defendant he could have had no costs; and there can go no attachment against an executor for non-payment of costs in this case, nor will any action lie for costs in this case on either side; and of that opinion was the court.

Michaelmas Term

26 Geo. 2. 1753.

Long *versus* Jackson. C. B.

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Departure,
New matter
may be re-
joined by the
defendant to
explain or
fortify his bar.

DEBT upon a bond; the defendant craves *oyer*, and sets out the condition, That whereas *A. B.* had put himself apprentice to the plaintiff: Now the condition of this obligation is such, that if the said *A. B.* shall not run away or depart from his said master during the time of his apprenticeship, then this obligation to be void, otherwise to remain in full force; and avers that *A. B.* did not run away or depart from the plaintiff during the term of his apprenticeship. The plaintiff replies that *A. B.* put himself apprentice with the plaintiff to serve him as such from such a day for the term of seven years, and assigns for a breach that *A. B.* departed from his service before the end of the said term of seven years. The defendant rejoins that the agreement between the plaintiff, defendant, and *A. B.* was, that *A. B.* should serve the plaintiff only for the term of five years, and concludes with an averment; the plaintiff demurs, and assigns for cause that the matter in the defendant's rejoinder is a departure from his plea.

Upon the argument it was objected for the plaintiff, 1st, That here is a departure; and 2^{dly}, That the rejoinder ought to have concluded to the country.

Co. Lit. 304. a. For the defendant it was said, as to the first objection, That although it be true in debt upon a bond where the defendant pleads

con-

conditions performed, the plaintiff replies and assigns a breach, and the defendant rejoins new matter in *excuse*, that this is a departure; yet it is as true that the defendant may introduce new matter in *explanation or fortification* of his bar, and it will be no departure; and this is the present case, for it does not appear by the condition set out, or upon the defendant's plea, for how long the term was to be; and this rejoinder is only an *explanation or fortification* of the bar, and not new matter of *excuse*.

As to the second objection, it was answered for the defendant, that the plaintiff in his replication discloses new matter, that the term was for seven years; he might have replied to the country that *A. B.* departed during the term, and then that would have come before the jury, whether the term was for seven years; but not having done so, but introduced new matter which did not appear before, the defendant has fully answered that new matter, and concluded rightly with an averment; and cited *Vere versus Smith* 1 *Ven.* 121. 2 *Lev.* 5. S. C. as directly in the point to this objection; the defendant had no occasion to disclose in his plea that the term was for five years, as no mention was made thereof in the condition of the bond. The court over-ruled both the objections, and gave judgment for the defendant. Serjeant *Agar* for the plaintiff, Serjeant *Poole* for the defendant

Julian *versus* Shobrooke. C. B.

ACTION upon a bill of exchange brought by the payee against the acceptor, who only accepted it in a conditional manner, *viz.* upon account of the ship *Thetis* when in cash for the said vessel's cargo; and the plaintiff avers in his declaration that at the day when the bill became payable the defendant was in cash for the said ship's cargo. Upon *non assumpsit* there was a verdict for the plaintiff; and now Serjeant *Agar* in arrest of judgment objected that the defendant was not liable by this conditional acceptance. *Sed per curiam*, the objection was over-ruled; and they said there is a difference between this sort of acceptance when the bill is drawn upon the person, and where it is drawn upon goods; and it is now settled that a parol acceptance of a bill of exchange is sufficient to charge the acceptor. 2 *Stra.* 1000, 1152.

A conditional acceptance of a bill of exchange is good, and so is a parol acceptance.

Anonymous. C. B.

Nil debet to a bond is bad on a general demurrer. **D**E B T upon a bond, *nil debet*, and a general demurrer; it was insisted by serjeant *Draper* for the defendant, that *nil debet* to a bond was good upon a general demurrer, and was only a jeoffail and matter of form, that after a verdict it would make a final end between the parties let the verdict be which way it will. *Sed per curiam*, It is naught upon a general demurrer, though perhaps it might be helped after a verdict. Judgment for the plaintiff.

Bell *versus* Simpson. C. B.

An award helped after a verdict. **D**E B T upon an award, whereby it was awarded that *Simpson* should pay *Bell* 22 *l.* and that they should give mutual releases of all actions and demands until the date of the said recited bond of arbitration. In arrest of judgment after a verdict it was objected by Serjeant *Poole* for the defendant, that it does not appear in the declaration, or in any part of this record, that there ever was any bond of arbitration, so that it is impossible to say till what time this award makes an end of matters in difference between the parties, and for any thing that appears this might be a parol submission. *Curia*: The defendant has pleaded no award; the plaintiff has replied, and assigned a breach for non-payment of the money; this might have perhaps been a good objection at the trial, but after a verdict we will suppose that the arbitration bond was shewn at the trial, and was agreeable to the release; so there must be judgment for the plaintiff. Serjeant *Willes* for the plaintiff.

Hilary

Hilary Term

27 Geo. 2. 1754.

Everall *versus* Mafon a prisoner. C. B.

DEBT upon a judgment; the defendant appeared by attorney and pleaded *nul tiel record*, and issue thereupon *quod habetur tale recordum*; the plaintiff signed judgment for non-payment for the issue; and now it was moved to set it aside, for that a prisoner is not obliged to pay for the issue book; but by all the Secondaries then in court it was reported that the practice is, where a prisoner appears by an attorney he shall pay for the issue, or judgment may be signed; otherwise it is where he appears in person. *Curia*: If this had been an issue to the country we would have set aside the Judgment upon paying the costs of the motion. and for the issue; for we will not let final judgment go where the merits have not been tried, and where the plaintiff cannot suffer any inconvenience by any affected delay, and here he has the defendant's body in prison; but as this is debt upon a judgment, there is no doubt but there is such a judgment, so there is nothing of merits to be tried, and the judgment must stand.

If a prisoner appears in person he is not bound to pay for the issue; otherwise if he appears by attorney.

Simmons Vicar of Kendall *versus* Langhorne. C. B.

DEBT upon a bond; the defendant craves *oyer* thereof, and sets out the condition: Whereas the inhabitants of *Selfide* have threatened to sue *Simmons* for nominating *William Langhorne* to be curate of *Selfide* chapel in the parish of *Kendall*: Now the condition of this obligation is such, that if the above-bounden *William Langhorne* shall save harmless and indemnified the said *Thomas Simmons* from all damages, expences and sums of money, which the said *Thomas Simmons* or his executors shall be obliged to pay by reason of the said *Thomas Simmons*'s making such nomination, or shall save him harmless and indemnified from all suits, &c. by reason thereof, or, &c. then this obligation to be void, otherwise, &c.

Debt on bond to save harmless from expences by reason of naming one to a curacy, or from suits by reason thereof. Non damnificatus; plaintiff replies, and assigns for breach that he was obliged to pay such a sum by reason of such nomination, but does not say how he was obliged; and well enough.

and pleads *non damnificatus*; the plaintiff replies, and assigns for breach that he was obliged to pay and did pay so much money by reason of such nomination of *Thomas Langborne* to the said curacy of *Selfide*; the defendant demurs generally, and the plaintiff joins in demurrer.

It was objected by serjeant *Poole* for the defendant, that the replication is not issuable; that the breach assigned is ill, because the plaintiff only says he has been obliged to pay, and did pay so much money by reason of such nomination of *Langborne* to the curacy, but does not say *how he was obliged to pay it*, whether by suit, or how, and the condition is to save him harmless from suits; and cited *Cro. Car.* 363. *Bro. tit. Condition*, pl. 36. 2 *Bulf.* 115. *Reeve versus Harris.* 2 *Vent.* 261. *Lutw.* 470. 1 *Brown's Ent.* 194. *Tomson's Entr.* 145. *Winch Ent.* 271, 375. 2 *Saund.* 81. 1 *Saund.* 114.

On the other side it was answered by serjeant *Draper*, that since all the cases cited the *stat. 4. & 5 Ann.* for amendment of the law was made, and if the breach be ill assigned, it is only in *form* not in *substance*, and this is upon a general demurrer; but he insisted the breach was well assigned and issuable, for where the condition is in the disjunctive, as it is here, if any one breach be assigned, *that* is sufficient; and here it is assigned in the very words of the condition, That the plaintiff was obliged to pay and did pay so much money by reason of such nomination of *Langborne* to the curacy; and there is no occasion to say how he was obliged to pay it, whether by suit in chancery, (which was the truth) or how otherwise.

Curia: The objection ought not to prevail, for this is only matter of *form*; but if it was matter of *substance*, the breach is well enough assigned and issuable, and it might be tried by the country whether the plaintiff has been damaged by reason of the nomination to the curacy. Judgment for the plaintiff *per tot' cur'*.

In *Hilary* vacation Mr. Justice *Gundry* died upon the western circuit, and Lord Chief Justice *Lee* died at *London* about the same time.

Easter Term

27 Geo. 2. 1754.

THIS term began upon the first day of *May*; upon the second of *May* Sir *Dudley Ryder*, Knt. the Attorney General, and the honourable *Henry Bathurst*, Esq; were called to the degree of serjeants at law, and the same day kept their feast in *Lincoln's Inn* hall; the former was appointed Lord Chief Justice of the King's Bench, and the latter a Justice of the Common Pleas, and took their places in the respective courts on Monday May 6, 1754.

Roe of the demise of *Jeffereys & al' versus Hen. Hicks Mil' & al'*. C. B.

EJECTMENT; verdict for the plaintiff subject to the opinion of the court upon this case: *Joseph Jeffereys* being seised in fee of the copyhold lands in question (which he held of the manor of *Higwell*, whereof the defendant Sir *H. Hicks* is lord) by his will dated in *October* 1746, devised the same in fee to *Elizabeth Jeffereys*, and surrendered the same to the use of his will; that upon the 19th of *March* 1752. *Elizabeth Jeffereys* was tried and convicted for the murder of the testator, and was afterwards hanged; that the testator died seised and *Eliz. Jeffereys*, was never admitted tenant, nor ever did any act to shew she was the lord's tenant; that Sir *H. Hicks* never entered, but the homage presented the attainder of *Eliz. Jeffereys*, and the premises in question have been granted to the defendants, as being forfeited to the lord by the attainder. The lessors of the plaintiff claim, one as heir at law to the deviser, and the other as heir of *Eliz. Jeffereys*, and the defendants as lord of the manor and purchasers under him. Three questions were made upon this case, 1st, Whether the lands were forfeited to the lord; 2^{dly}, Whether the surrender to the use of *Eliz. Jeffereys* did not prevent the descent to the testator's heir at law; and 3^{dly}, Whether the attainder did not hinder the descent to her heir.

10/13/16. 80. 573. Ad. 254.
A surrender to one who is convicted of felony and hanged before admittance, the lands are not forfeited to the lord, but descend to the heir of the surrenderor
JAN 2 1755

But upon the argument, the three questions were reduced to one, to wit, Whether Miss *Jeffereys* by the will and surrender had such estate or interest in the premises as she could forfeit to the lord of

PART II.

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the

the manor, for if she had not, either the heir of the devisor, or the heir of Miss *Jeffereys*, will have title.

It was argued by Serjeant *Willes* for the plaintiff, that the heir at law of the devisor had title, and that nothing was ever in Miss *Jeffereys*, and that by the surrender alone without admission she never was tenant to the lord either in law or in deed; and that before admission a purchaser of copyhold lands cannot bring an ejectment for them, as an heir who is by descent may do; and the reason is, because the admission of the ancestor is, in law, considered as the admission of the heir to many purposes, but the admission of the surrenderor is not the admission of the surrenderee, and the surrenderee cannot do any legal act before admission; there never was any privity between Miss *Jeffereys* and the lord, she never had any estate in the lands, and it is absurd to say she forfeited what she never had; the estate descended to the devisor's heir, who, in supposition of law, was the tenant to the lord immediately upon the death of the devisor. *Cro. El.* 349. *Yelv.* 144, 145. 2 *Bullf. Foord* versus *Hofkins*. These cases prove that the surrenderee has neither *jus in re* nor *ad rem* before his admittance.

For the defendants it was admitted by serjeant *Prime*, that if Miss *Jeffereys* had nothing in her, neither *jus in re* nor *ad rem*, she certainly could forfeit nothing. But he insisted that upon the death of her uncle the devisor, and before her attainder, she had a capacity to take under the will and surrender, and had a right to be admitted tenant, although she would have forfeited upon being convicted; for a person may have a capacity to take, though not to hold, 1 *Inst.* 2. *a. b.* and a person incapable to take for himself shall be capable and presumed to take for the benefit of the crown, so may Miss *Jeffereys* be presumed to take for the benefit of the lord.

But it is objected she was never admitted, and she could not be tenant without it. In answer to this she certainly had a right from the instant the devisor died, and after admittance could recover the profits and rent from the time of his death; and to say the heir shall have the profits until the devisee shall be admitted is very strange. Miss *Jeffereys* certainly had *jus ad rem*, for upon the will and surrender the lord was bound to admit her upon that title.

Suppose a surrender be made to the use of *J. S.* and the lord receives the surrender, but refuses to hold a court to admit *J. S.* and instead thereof enters and takes the profits, the surrenderee *J. S.* shall upon this title maintain an ejectment against the lord without any admittance, for the lord shall not take advantage of his own wrong; this could not be, if there was no title in a surrenderee before admittance; (this was said *arguendo*, and I heard no case cited to support it; *ideo quare.*)

Upon

Upon the death of the devisor before the attainder the heir at law could not have maintained an ejectment, unless Miss *Jeffereys* in the lord's court had first refused to accept, and be admitted tenant.

Berneford versus *Packington*, 1 *Leon.* 1. he cited as a case in point; where the grandfather of the plaintiff died seised in fee of a copyhold, leaving a widow who was admitted to her free-bench of the whole by the custom, and a son *A.* who in his mother's life was convicted of felony; and this was held to be a forfeiture, though *A.* was never admitted, and though the lord could not seise during the widow's life.

Curia: The single question is, Whether if a man surrenders a copyhold to one who is attainted and hanged before admittance, the lands shall be forfeited to the lord.

Miss *Jeffereys* never entered, never was admitted, nor ever did any act to shew she was tenant; and a surrender and admittance make but one conveyance, so how could the right heir lose the estate?

It is said for the defendant, it is otherwise in the case of the heir who is *in* by descent, and that he can bring an ejectment before admittance; this is very true, but a surrenderee cannot.

It is said that a surrenderee may recover the mesne profits from the time of the surrender; that is true, after he is once admitted; and so may a feoffee from the date of the feoffment after livery and seisin, and a bargainee after inrolment; the reason is, because they are considered as one conveyance.

A will and surrender to the use thereof would not be sufficient to maintain an ejectment against the heir at law.

If the lord was to accept a surrender, and the surrenderee enter thereupon, and afterward the lord was to disseise him before admittance, an action lies against the lord, because he shall not take advantage of his own wrong.

As to the case 1 *Leon.* 1. the answer to it is, that the heir at law was *in* of his reversion, which differs totally from this case. The estate upon the death of the devisor descended to his heir, who is the plaintiff's lessor in the first demise, and he must be considered in law as tenant to the lord until somebody else be admitted.

In the case of a devise of a copyhold nothing vests in the devisee or surrenderee, nor in the lord, and until admittance the estate in
law

Cro. Eliz.
441. 442.
Wil. Rep.

law is in the surrenderor. The will may be quite laid out of the case; for as to a copyhold it is considered only as an appointment, and there need not be three witnesses to it; but admittance is as necessary to a surrender, as enrolment to a bargain and sale, or livery to a feoffment.

N. The whole court inclined to give judgment for the plaintiff upon this first argument, but gave no absolute opinion. *Adjournatur. Vide post.*

Trinity Term

27 & 28 Geo. 2. 1754.

Roe of the demise of Jeffreys & al' *versus* Hicks & al'. C. B.

THIS case was argued a second time this term, when the court was still of opinion for the plaintiff, That Miss *Jeffereys* had no legal interest in the estate, so could have no legal remedy to recover it, and having no legal *jus in re* nor *ad rem* could not forfeit any thing.

Waldock *versus* Cooper. C. B.

In a base court the declaration must alledge that the goods were sold and delivered within the jurisdiction, as well as that the defendant promised within it.

WRIT of false judgment brought by *Waldock* against *Cooper* upon a judgment in the borough court of *Aylesbury*; *Cooper* being plaintiff below, declares that *Waldock* was indebted to him at *Aylesbury* for divers goods sold and delivered by him to *Waldock*, (not saying that they were sold and delivered *there*, or within the jurisdiction), and being so indebted, he the said *Waldock* promised within the jurisdiction to pay; upon *non assumpsit*, there was a verdict and judgment for the plaintiff below; and now it was objected, that the declaration does not alledge that the goods were sold and delivered within the jurisdiction, but only says that *Waldock* was indebted,

indebted and promised at *Aylesbury* within the jurisdiction. 1 *Saund.* 73. 2 *Lev.* 87. 2dly, It was objected that the judgment was wrong, which is, that the plaintiff below *ought to recover*, whereas it ought to be, *That he do recover*, in the present tense. *Curia*: If there were no precedents to the contrary we should be desirous to help this judgment after a verdict, but we cannot do it against so many precedents; so the judgment must be reversed. And *N. B.* Both the objections were held to be good, and either of them sufficient to reverse the judgment.

Michaelmas Term

28 Geo. 2. 1754.

Rex *versus* Serjeant Mead & al'. Plea—Roll 56. C. B.

A Writ of disceit to reverse or set aside a fine and recovery which were levied and suffered in this court *tempore* Car. 2. of lands held in antient demesne at *Havering atte Bower* in *Essex*, which ought not to have been done, such lands being only pleadable by writ of *right close*, in the court of antient demesne; the defendants confess the declaration and writ of disceit to be true by their plea, and the Attorney General, who sues for the King, remits the damages; and now Serjeant *Poole* for the King moved for judgment, and had a rule to shew cause, which was afterwards made absolute.

Writ of disceit to set aside a fine and recovery of lands in antient demesne.

Hilary Term

28 Geo. 2. 1755.

Pendock of the devise of Mackender *versus* Mackender.
C. B.

One convicted
of petit lar-
ceny and
whipt cannot
be a witness,
And it is the
crime and not
the punish-
ment which
makes a man
infamous.

THIS is an ejectment for lands in *Kent*; the substance of the case reserved at the assises for the opinion of the court is shortly this: That *J. M.* being seised of the lands in question, by his will executed in *September* 1750. devised the lands to the defendant; that there were three witnesses to the will, *viz. Thomas Turner, Jos. Jeffery*, and another; that *Jos. Jeffery*, one of the witnesses before the time of attestation thereof, was indicted, tried and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping.

The plaintiff claims as heir at law to the testator, and therefore the single question is, whether one convicted and whipped for petit larceny be a competent witness, within the statute of frauds and perjuries.

5 Mod. 75. After three arguments at the bar the whole court were clearly of opinion that *Joseph Jeffery* was not a competent witness, and laid it down as a rule, that it is the crime that creates the infamy, and takes away a man's competency, and not the punishment for it; and it is absurd and ridiculous to say it is the punishment that creates the infamy.

The pillory has always been look'd upon as infamous, and to take away a man's competency as a witness; but to put one case (amongst many that might be put) to shew this is a very absurd notion, is sufficient: If a man was convicted upon the *stat. 4 W. & M.* against deer-stealing, there is a penalty of 30*l.* to be levied by distress, and if he has no distress, he is to be put in the pillory; so that if the pillory be infamous, the person convicted (according to this notion) will be so, if he has not 30*l.* but if he has 30*l.* he will not be infamous.

In the present case both the crime and punishment are infamous; and he that steals a penny has as wicked a mind as he that steals a larger sum, if not a more wicked mind, for he has the less temptation; petit larceny is felony, 1 *Hawk.* 95. f. 36. And no case has been cited where a person convicted thereof was ever admitted to be a witness. Judgment for the plaintiff *per totam curiam*.

3 Inst. 218.
1 Hale 503.
2 Hale 277.
2 Bull. 154.
Co. Lit. 158a.

Armstrong of the devise of Neve *versus* Wolfey. C. B.

EJECTMENT, tried at *Norwich* before Parker Ch. Baron, who reserved this short case for the opinion of the court. *A. B.* being in possession of the lands in question levied a fine *sur conusans de droit come ceo, &c.* with proclamations to the conusee and his heirs, in the 6th year of the present King, without any consideration expressed, and without declaring any use thereof; nor was it proved that the conusee was ever in possession.

7 *Mod.* 102

So that the single question is, whether the fine shall enure to the use of the conusor or the conusee, and after two arguments the court was unanimous, and gave judgment for the plaintiff, who claimed as heir of the conusor.

A fine levied without any consideration or uses declared shall enure to the old use in whomsoever it was.

Curia: In the case of a fine *come ceo, &c.* where no uses are declared, whether the conusor be in possession, or the fine be of a reversion, it shall enure to the old uses, and the conusor shall be in of the old use, and although it passes nothing, yet after five years and non-claim it will operate as a bar.

And in the case of a recovery suffered, the same shall enure to the use of him who suffers it (who is commonly the vouchee) if no uses be declared; but he gains a new estate to him and his heirs general; and although before the recovery he was seised *ex parte maternâ*, yet afterwards the estate will descend to his heirs *ex parte paternâ*, as was determined in *Martin versus Strachan ante*. See *vide* that case 2 *Stra.* 1179.

In the case at bar, the antient use was in the conusor at the time of levying the fine; and it seems to have been long settled before this case, that a fine without any consideration, or uses thereof declared, shall enure to the antient use in whomsoever it was at the time of levying the fine; and as it was here in the conusor at that time, the judgment must be for the plaintiff.

Anonymous.

Anonymous. C. B.

A declaration
of a surgeon
for curing
the foul
disease ought
to be referred
for scandal.

THIS was an action for a surgeon's demand, and in every count in the declaration it was laid to be for curing the defendant of the foul disease; the court expressed great displeasure that such language was used in a declaration when there was no occasion for it, and intimated their desire that whenever the like scandal is inserted in a declaration, that somebody would move to strike the words out, and to refer it for scandal and impertinence, and that they should direct the prothonotary to tax exemplary costs; that the rule for referring scandal, &c. ought to be the same at law as in equity; and they remembred 350*l.* costs taxed in Chancery for scandal.

Baldwin *versus* Tudge. C. B.

Any amercia-
ment of a
freeholder
must be af-
feered by free-
holders of the
manor, or
debt will not
lie for it.

DEBT for an amerciamment in a court baron against a freehold tenant of the manor; upon *nil debet*, it appeared in evidence at the trial at *Worcester* before Mr. Justice *Clive* by an entry upon the court rolls that the defendant was amerced, and that the same was affeered by two affeersors, whose names were set down there; but it was objected that it did not appear in proof that the two affeersors were freeholders of the manor; and that point was reserved for the opinion of the court.

After argument at the bar by serjeant *Prime* for the plaintiff, and serjeant *Willes* for the defendant, the whole court were clear of opinion that an amercement of a freehold tenant in a court baron must be affeered by his peers, that is to say, by free tenants of the manor; and founded their judgment upon *Magna Chart. c. 14.* and *F. N. B. 8vo. Moderata misericordia, fol. 185.* whereby it appears that the affeement shall be *per probos & legales homines de vicineto*, which means *per pares de vicineto*, and none can be peers of a freehold tenant but a freehold tenant of the same manor in this particular case; *Fitzherbert* was a very great lawyer, and the clearest writer in the law; and where he says, that by the statute of *Magna Charta* every amerciamment in a court baron ought to be affeered by two tenants of the manor; he must mean freehold tenants, for they are properly the tenants of the manor; for the court baron at common law is the freeholders court, of which they are the suitors and judges; and when all the freehold tenants are gone except one, the court baron is gone too.

And

And therefore, as it did not appear that the amerciament set upon the defendant was affected by his peers, they held that this action did not lie, and gave judgment for the defendant.

N. Probi & legales homines de vicineto, must be taken and construed *secundum subjectam materiam*; they may mean the freeholders of a manor, or of a county, &c.

Easter Term

28 Geo. 2. 1755.

Ford *versus* Parr & al'. C. B.

2 B & C 580, 621

TRESPASS, tried at *nisi prius* before Mr. Justice Foster, who omitted to certify in court at the trial that the trespass was wilful and malicious upon the *stat. 8 & 9 W. 3. c. 10.* in order to intitle the plaintiff to full costs; and afterwards upon application he certified out of court. The question now was, whether the judge had power to certify out of the court of *nisi prius*. *Per curiam*, The certificate is void, and contrary to the statute, which enacts that it shall be made in open court at the trial.

A judge of *nisi prius* cannot certify for costs out of court.

Law *qui tam versus* Crowther. C.B.

THE defendant moved to plead *nil debet* to the whole; and *2dly*, a recovery as to the second count; but *per curiam*, The *stat. 4 & 5 Anne* for pleading double does not extend to *qui tam* actions; and this has been often refused *here* as well as in *B. R.*

Stat. 4 & 5 Anne does not extend to *qui tam* actions.

Trinity Term

28 & 29 Geo. 2. 1755.

3a & 897

2 m & w 503

Doe on the demise of Milbourne & ux' *veafus* The purchasers under the assignees of a commission of bankrupt awarded against George Simpson. C. B.

What deed
shall amount
to a covenant
to stand seised
to uses.

IN ejectment of lands in *Northumberland*, the following case was made at the assises for the opinion of the court.

George Simpson being seised in fee of the lands in question, in consideration of a marriage to be had between him and *Ann Storey* by indenture between him the said *George Simpson* of the one part, and the said *Ann Storey* and *William Storey* of the other part, gives, grants, enfeoffs, aliens and confirms to *Anne Storey* and *William Storey* and their assigns the lands (in question) then in the possession of *George Simpson*, *habendum* to the use of the said *Ann Storey* for life, remainder to the heirs of her body begotten by the said *George Simpson*, who covenants that the lands shall remain to the said uses clear of all charges: the marriage took effect, *George Simpson* afterwards became bankrupt, and the assignees seised the land and sold it to the defendants, as taking this deed to be void in law; or if it was not void, that *George Storey* was seised in tail by it.

After argument at the bar by serjeant *Poole* for the plaintiff (who claims under this deed), and serjeant *Prime* for the defendants, it was resolved by the whole court that this deed cannot operate as a bargain and sale, because no pecuniary consideration was paid, nor as a release, because there was no lease for a year, nor were the grantees in possession; nor as a feoffment, because there was no livery and seisin; and therefore the single question was, whether it shall not operate as a covenant to stand seised.

And although it was objected that there wants a consideration of blood between the covenantor and *William Storey*, and that it seemed to be the intent of the parties that the deed should operate as a common law conveyance, yet it was resolved by the whole court, that it shall operate as a covenant to stand seised, whereby

an estate in special tail is clearly in the said *Ann Storey*; and *George Simpson* (who is now dead) had only an estate for life by implication with a reversion in fee; and they said that judges had been *astuti* to construe deeds to take effect according to the intent and meaning of the parties, *ut res magis valeat quam pereat.* 2 *Inst.* 672. *Hob. Shap. Touchf.* 87. 1 *Lutw.* 782. 1 *Mod.* 175. 1 *Vent.* 137. 2 *Lev.* 213. 3 *Lev.* 370. *Carth.* 2 *Stra.* 934.

Judgment for the plaintiff.

Biddulph, Esq; *versus* Ather. C. B.

TROVER for a sloop, upon Not guilty, was tried before Mr. Justice *Wilmot* at the last assizes for the county of *Suffex*. Upon a motion for a new trial the judge certified, that the plaintiff's title to the sloop was, that he is lord of the manor of *Lancing* in the county of *Suffex*, and being so, is intitled by prescription to all wreck of the sea thrown upon *that* manor, and that the sloop for which this action is brought was wrecked upon that manor.

Two allowances in eyre, and a judgment in trespass 400 years since, are not conclusive evidence against usage for 92 years last past to have wreck of the sea.

And to prove his prescriptive right, the plaintiff by court rolls and parol evidence proved that the lords of the manor of *Lancing* had taken and enjoyed wreck thrown upon that manor from the 23d day of *April* 1663. until the time of bringing this action without any interruption.

For the defendant (who is bailiff or servant to the Duke of *Norfolk*, and seised this sloop as wreck on behalf of his Grace) it was insisted that the Duke of *Norfolk* was intitled to all wreck thrown upon any lands lying within the rape or barony or honour of *Brambre* in the county of *Suffex*; and it was proved that the manor of *Lancing* lies within the hundred of *Brightford*, which lies within the rape, or barony or honour of *Brambre*.

It was also proved for the defendant by records, that at a court of eyre held at *Chichester* in *Suffex* in the 7th year of King *Edw.* 1. *Adam de Barent* claimed free chase in his manor of *Rocking*, and wrecks of the sea in his manor of *Hay*, which liberties he and his ancestors had enjoyed time immemorially; and it was found by the jury that he and his ancestors had and ought to have free chase in his manor of *Rocking*, and that he and his ancestors never had wrecks of the sea, nor ought to have in his manor of *Hay*, *eo quod Domini Barones de Brambre semper ibidem & alibi per totam Baroniam prædictam eâ libertate usi fuerunt & eam habere debent*, and therefore as to the wreck of the sea he was amerced for his false claim.

It

It was also proved for the defendant by record, that at the same court *Nigel de Brock* and *Hugo de Bussey* claimed wreck of the sea in their manors of *Lancing* and *Kingston* near *Shoreham*, and that they and their ancestors had time immemorially used the said liberties, and it was found by the jury *quod prædicti Nigellus et Hugo nunquam utebantur prædictis libertatibus, nec wreccum illud habere debent sed Dominus Willielmus de Breuse illud wreccum habere debet si acciderit per costeram maris in Rape de Brambre, ideo consideratum est quod prædicti Nigellus & Hugo de cætero non hab. ant prædictum wreccum, sed quia illud clamabant sint in misericordia pro falso clamore.*

It was likewise proved for the defendant by record, that in the 7th year of *Ed. 3.* *John Odrich* and several others were attached to answer *John de Mowbray quare cum ipse dominus honoris de Brambre existat, idemq; Johannes de Mowbray habeat & ipse & antecessores sui domini honoris prædicti a tempore quo non extat memoria hucusq; habere consueverunt infra honorem prædicti wreccum maris & quicquid ad hujusmodi wreccum pertinet, præfati Johannes Odrich* (and many other persons) took and carried away divers quantities of goods cast by the sea upon the land at *Hone, Worthyng, Lancing, Pende, Shoreham* and *Kyneston* within the honour of *Brambre*, and which ought to belong to the said *John de Mowbray* as wreck; and upon Not guilty pleaded, the jury found, that several of the defendants in the pleadings mentioned were guilty of taking and carrying away the said wreck to the plaintiff's damage of 100*l.* and judgment is entred against them for the said 100*l.*

Then Mr. Justice *Wilmot* further reports, that it was insisted for the defendant at the trial that these three records proved that the usage set up by the plaintiff must have commenced within the time of memory, since the reign of *Richard* the first, and that therefore the plaintiff's prescriptive right claimed by him was defeated, and that he (the Judge) ought to have directed the jury to find for the defendant.

But upon the trial (says the Judge) I was of opinion, and did deliver it as my opinion to the jury, that the records produced were not conclusive, but were matter of evidence to be left to their consideration; and unless the said records are conclusive, I think the verdict was agreeable to the evidence which was for the plaintiff, damages 50*l.*

Upon this motion for a new trial, the court ordered this cause to be set down in the paper to be argued solemnly: and now it was insisted by serjeant *Prime* for the defendant, that these records of judgments or determinations in eyre, and judgment in trespass being

in proper courts, having competent jurisdiction of the matter in question, are conclusive evidence for the defendant, and that the Judge was mistaken in his opinion and direction to the jury, and ought not to have left the matter to the jury in the manner he did, but should have directed them to find a verdict for the defendant; and for this purpose he cited *Carth. 225. 1 Salk. 290. 2 Stra. 960. 961.* and said, that the records given in evidence in the present case seemed to him stronger than a sentence in the spiritual court in the case of a marriage, which is always holden to be conclusive. If a vicar's endowment be within the legal time of memory, the parson cannot prescribe against it though he has ancient usage of his side in proof. *Moor 761. pl. 1055. 2 Rol. Abr. 269. p. 17.*

On the other side for the plaintiff it was insisted by serjeant *Willes*, and resolved by the whole court, that neither these two allowances in eyre, nor the judgment in trespass, were conclusive; and some of the Judges doubted whether they were any evidence at all; but all agree that usage for the plaintiff for 92 years last past, was much stronger proof of the plaintiff's right, and the whole was fit to be left to the jury; and they all said the jury and the Judge had both done right.

They admitted that a sentence in the ecclesiastical court, in a matter whereof they have the sole cognisance, is conclusive evidence, and parol evidence shall not be received against it; but that is, because *that* court hath the sole cognisance thereof; and that an endowment of a vicar destroys the prescriptive right to tithes in the parson; but that the present records were no more conclusive than an inquisition *post mortem*, or a verdict (in many cases) touching the same matter, which is often *res inter alios acta*, as in the action of trespass by *Mowbray*, it might perhaps be brought by the person then in possession against persons who were mere wrong-doers, for any thing that appears; and in pleading an allowance in eyre, the true way *per Holt. C. J.* is to alledge an immemorial usage, and then also to produce the allowance in *B. R.* or in eyre. *1 Salk. 184.*

*as in this action, there
cannot be a Spal Plea.*

Rule to shew cause why a new trial should not be granted was discharged, and judgment given for the plaintiff.

y^h 288Farmer of the demise of Earl *versus* Rogers. C. B.

A surrender
of a lease for
years, may be
by writing
without a
deed, or seal-
ing, or stamp
duty paid.

IN ejectment the following case was made for the opinion of the court, *viz.* *A. B.* by deed indented mortgaged the lands in question to *C. D.* for 500 years, with a proviso that the term shall cease and be void upon payment of 500*l.* and interest upon a certain day; sometime after the day limited for payment thereof *A. B.* paid to *C. D.* all principal and interest due to him upon this mortgage; *A. B.* is dead, and *Earl*, the lessor of the plaintiff, as his heir at law, has brought this ejectment against the defendant, who has got the said mortgage deed in his hands, and is in possession of the premises: at the trial the defendant produced this deed, upon the back whereof there is this indorsement in writing without any seal or stamp to it, *viz.* "Received this—day of *March* 1738. (being "after the day limited by the proviso) of *A. B.* so much money "for all principal money and interest till this day; and *I do release "the said A. B. and discharge the within mortgaged premises from "the term of 500 years,"* signed by *C. D.* the mortgagee. That the defendant at the trial did not prove that he had any interest in the term, but insisted it was still subsisting, and that possession was sufficient against the plaintiff, who must recover upon the strength of his own case.

This case was argued twice; the first time in *Michaelmas* term last by serjeant *Wynne* for the plaintiff, and serjeant *Draper* for the defendant; the second time by serjeant *Prime* for the plaintiff, and serjeant *Willes* for the defendant, in *Easter* term last.

It was argued for the plaintiff that the term is not subsisting, but is surrendered by the memorandum on the back of the mortgage deed. That a surrender of a term at common law might have been by parol without a deed. *Perk. surrender, sec. 583, 584.* and that whether the term was created by deed or not, *Perk. sec. 607, 608. Cro. Eliz. 488.* That the word *surrender* is not necessary to make a surrender, but any other words tantamount will be sufficient; as if lessee for life say to the lessor, that he grants that he shall enter into the land, and that he is willing that he shall have the land. *2 Ro. Abr. 497. H. pl. 1. 498. pl. 2.* These authorities shew that at common law a term for years, whether created by deed or not, might have been surrendered by parol without deed, and that words which are not so strong as the words *release and discharge* in the present case, shall amount to a surrender.

2dly, It was contended for the plaintiff, that the statute of frauds and perjuries had not so much altered the common law, but that

leases for long terms of years may be still made without deed, by writing, and the same may be surrendered by a note in writing, without a deed; and a seal is not necessary to this indorsement or memorandum in writing, which in consideration of law is a parol surrender reduced into writing, and was proper evidence at the trial to prove a surrender of the term.

For the defendant it was admitted, that at common law terms which were created by parol might be surrendered by parol, but denied that a term created by deed could be surrendered by parol, and that the term was still subsisting, and might be assigned and kept on foot to protect the inheritance, and that as the payment was after the day, and the legal estate is still in the mortgagee, there ought to be judgment for the defendant.

After time taken to consider until this term, judgment was given for the plaintiff by the whole court.

And it was resolved by the court, that before the statute of frauds a lease for years either by deed, or parol, might have been surrendered without deed, by parol; that the words *release and discharge the term of 500 years*, are much stronger than words which in many cases have amounted to a surrender, *ut res magis valeat quam pereat*.

2. It appears by the statute of frauds and perjuries, that a lease Gilb. 235, for any term of years may be created by writing without deed, 236. and that the same may be surrendered by deed or *note in writing*. *Vide sec. 3. of that statute*, And the court held that there was no occasion for any stamp duty upon this note or indorsement, it not being a deed. *but a lease must be surrendered though it is a deed release*

Michaelmas Term

29 Geo. 2. 1755.

Fryer *versus* Johnson. C. B.

Custom to
bury as near
as possible to
ancestors is
bad.

SPECIAL action upon the case against the parson of the parish, setting out that there has been a custom in the parish time out of mind, that every parishioner has a right to bury his dead relations in the church-yard as near to their ancestors as possible, and that the defendant refused to permit the plaintiff to bury a relation as near as possible to his ancestor; after a verdict this was held clearly to be a bad custom by the whole court upon the first argument.

Loyd, Esq; *versus* Winton. C. B.

Costs.
Seizure for a
heriot custom
is not within
the stat. 11
Geo. 2. c. 19.
in respect to
double costs.

REPLEVIN for taking an ox and detaining him against gages, &c. The defendant avows that he is seised of the manor of A. and sets out a custom, that upon the death of a tenant he is intitled to a heriot by custom, and so seised the ox, which was the property of the plaintiff's late father, who was his tenant, and lately died. The plaintiff replies that the ox was his own, and not his father's, and traverses that the ox was his father's property. Upon this issue the plaintiff was nonsuited at the trial, and the prothonotary taxed the avowant double costs, upon the stat. 11 Geo. 2. c. 19. And now serjeant Poole moved that the prothonotary was mistaken, and ought to review his taxation, and allow only single costs, insisting that the statute did not extend to this case, which was not a *distress for a heriot service*, but a *seizure for a heriot custom*, for the words of the statute are, *Distresses for rent, quit-rents, reliefs, heriots, and other services*; and of that opinion was the court, and ordered the prothonotary to review his taxation, although it was insisted by serjeant Wilson for the avowant, that this case was within the equity and meaning of the statute, though not within the very words.

Easter

Easter Term

29 Geo. 2. 1756.

Goodright of the demise of Priscilla Larmer widow
versus William Searle and Sarah his wife. C. B.

EJECTMENT for lands in the county of *Southampton*; An executory devise in fee upon Not guilty issue was joined, which is entred of *Trinity* term in the 27th and 28th years of his present Majesty, Roll 735. and was tried at *Winchester* at the then next affizes, when a special verdict was found by the jury, who on their oath say, that long before the within written time when the within mentioned trespass and ejectment are supposed to have been committed, one *George Paynter* in his life-time was seised of and in certain freehold messuages, lands, tenements and hereditaments, with the appurtenances, in *Odibam* and *Northwarnborough* in the parish of *Odibam* in the county aforesaid, parcel of the premises in the declaration within written mentioned, in his demesne as of fee; and that the said *George Paynter* in his life-time, and long before the said within written time when &c. was likewise seised of and in the reversion of certain copyhold messuages, lands, tenements and hereditaments, with the appurtenances, situate, lying and being in *Hall-place* in the county aforesaid, parcel of the manor of *Hall-place* in the same county, and residue of the premises in the declaration within written mentioned, expectant on the death of *Catherine Paynter*, mother of the said *George Paynter*, in his demesne as of fee and right, at the will of the lord of the said manor according to the custom of the same manor; and being so respectively seised thereof, he the said *George Paynter* in the life-time of the said *Catherine*, and before the within written time when, &c. to wit, on the 26th day of *September* in the year of our Lord 1750. at *Odibam* aforesaid made his last will and testament in writing, and thereby gave and devised (among other things) the same freehold and copyhold premises (the said copyhold premises being first duly surrendered to the use of his will) in these words following, to wit, And as to, for and concerning all and singular other my customary or copyhold messuages, lands, tenements and hereditaments, with their appurtenances, situate, lying and being in the tithing of *Yately*

Special ver-
dict.
G. P. in devise of C. P.
(say he has been sum-
moned to his will)
made his will &c.

is like to (tho' not) a contingent remainder, and is transferrable to the heir of the executory devise, who dies before the contingency happens.
S. P. was determined in the case of *Goodtitle* of the demise of *Gurnell v. Wood* in C. B. Trin. 13 & 14 G. 2. upon a case made at *Appleby*.

G. P. seized of freeholds & copyholds &c. on death of C. P.

PART. II. I within

within the manors of *Condall* aforesaid and *Hall-place* in the said county of *Southampton*, the same being also surrendered to the use of my will; and also as to, for and concerning all and singular my freehold me. Juages, lands, tenements and hereditaments, situate, lying and being in *Odibam* and *North Warnborough* in the parish of *Odibam* in the said county of *Southampton*, now in the tenure or occupation of *John Collins* and *John Raggett*, their undertenants and assigns, "I give and devise the same copyhold and freehold hereditaments and premisses unto my said son *George Paynter*, his heirs and assigns for ever; but if he my said son *George Paynter* shall happen to die before he shall attain his said age of 21 years, leaving no issue living at the time of his death, then I give and devise the said premisses unto my said mother *Catherine Paynter*, and to her heirs and assigns for ever," as by the last will aforesaid to the jurors aforesaid shewn in evidence fully appears: And the jurors aforesaid on their said oath further say, that afterwards, to wit, on the said 27th day of *September* in the same year 1750. at *Odibam* aforesaid, the said *George Paynter* the testator, without altering or revoking his said will, died seised of such estates in the premisses in which, &c. leaving issue the said *George Paynter* the devisee his only son and heir, and that the said *Catherine Paynter* widow, mother of the said *George Paynter* the testator, survived the said *George Paynter* the testator, and afterwards, to wit, on the 5th day of *January* in the year of our Lord 1754. at *Odibam* aforesaid died; and the jurors aforesaid on their said oath further say, that the said *George Paynter*, son and heir of the said *George Paynter* the testator, was the grandson and next heir of the said *Catherine*, to wit, the son and heir of the said *George Paynter* the testator, which said *George Paynter* the testator was the only son and heir of the said *Catherine*, and that the said *George Paynter*, son and heir of the said *George Paynter* the testator, and grandson and next heir of the said *Catherine*, afterwards, to wit, on the 6th day of *January* in the said year of our Lord 1754. at *Odibam* aforesaid died before he had attained his said age of 21 years, to wit, at his age of 19 years, and without ever having had any issue of his body lawfully begotten; and the jurors aforesaid on their said oath further say, that *Priscilla Larmer* widow, in the declaration named to be the lessor of the plaintiff, is and at the same time when, &c. was cousin and next heir on the part of the father of *George Paynter* son of the said *George Paynter* the testator, that is to say, the daughter and heir of *George Paynter* the brother of *William Paynter*, which *William Paynter* was the father of the said *George Paynter* the testator, the father of *George Paynter* the devisee in the will above mentioned, to the said jury shewn in evidence, who died under age as aforesaid, and without leaving any issue of his body lawfully begotten living at the time of his death aforesaid; and the jurors aforesaid on their said oath further say, that the said *Sarah*, the wife of the said *William Searle* in the declaration

Testator dies seized

C. P. dies

G. P. dies under age

G. P. dies under 21

The lessor of the plaintiff's claim by descent.

as shown to G. P.

claration within written mentioned, is, and at the said time when &c. was the sister and next heir of the said *Catherine Paynter*, and the cousin and next heir of the said *George* the grandson of her the said *Catherine* on the part of her the said *Catherine*, that is to say, the sister and next heir of the said *Catherine Paynter*, which *Catherine Paynter* was the mother of the said *George Paynter* the testator the father of the said *George Paynter* the devisee in the will above mentioned; and the jurors aforesaid on their said oath further say, that before the within written time when &c. to wit, on the eighth day of April in the 27th year of the reign of his present Majesty, the said *Priscilla Larmer* entered into the tenements aforesaid, with the appurtenances, in the declaration aforesaid mentioned, and was thereof seised as the law requires, and being so thereof seised, she the said *Priscilla Larmer* afterwards upon the said 8th day of April in the said 27th year of his Majesty's reign at *Odibam* aforesaid demised the tenements aforesaid, with the appurtenances, to the said *Peter Goodright*, to hold the same to the said *Peter Goodright* and his assigns from the 25th day of March then last past unto the full end and term of seven years from thence next ensuing and fully to be compleat and ended; by virtue of which said demise the same *Peter Goodright* into the tenements aforesaid, with the appurtenances, entred, and was thereof possessed until the said *William Searle* and *Sarah* his wife afterwards, to wit, on the said 8th day of April in the 27th year aforesaid into the tenements aforesaid, with the appurtenances, which the said *Priscilla Larmer* to the said *Peter Goodright* in form aforesaid demised for the term aforesaid, which is not yet elapsed, in and upon the possession of the said *Peter* entred, and ejected him the said *Peter* out of his farm aforesaid (his term aforesaid therein not being ended), as the said *Peter* within thereof complains against them; but whether upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found the said *William Searle* and *Sarah* his wife are in law guilty of the trespass and ejectment aforesaid in the tenements aforesaid, with the appurtenances, in the declaration aforesaid mentioned, the jurors aforesaid are intirely ignorant, and therefore pray the consideration of the justices of our Lord the King of the Bench; and if upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found it shall appear to the same justices of the Bench that the said *William Searle* and *Sarah* his wife are in law guilty of the trespass and ejectment aforesaid in the tenements aforesaid, with the appurtenances, in the declaration aforesaid mentioned, then the jurors aforesaid say on their oath aforesaid, that the said *William Searle* and *Sarah* his wife are thereof guilty in manner and form as the said *Peter Goodright* within against the said *William Searle* and *Sarah* his wife thereof complains, and they assess the damages of the said *Peter Goodright* on the occasion aforesaid, besides his costs and charges by him about his suit in this behalf expended to one shilling,

The defend-
ant's claim

by descent as heir to C. P. d.
and her son P. on v. shop.
Catherine

shilling, and for those costs and charges to 40 s. But if upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found it shall appear to the same justices of the Bench that the said *William Searle* and *Sarah* his wife are not guilty in law of the trespass and ejectment aforesaid in the tenements aforesaid, with the appurtenances, in the declaration aforesaid above mentioned, then the same jurors say on their oath aforesaid, that the said *William Searle* and *Sarah* his wife are not thereof guilty in manner and form as the said *William Searle* and *Sarah* his wife within for themselves by pleading have alledged : and because the justices here are willing to advise themselves of and upon the premisses before they give their judgment thereon, a day is given to the parties aforesaid here until in eight days of Saint *Hilary* of hearing their judgment thereon, for that the same justices here are thereof not yet advised, &c.

This special verdict was twice solemnly argued at the bar ; 1st, By *Poole* serjeant for the plaintiff, and *Hewit* serjeant for the defendant, in *Trinity* term in the 28th year of his present Majesty ; the 2d time by *Davy* serjeant for the plaintiff, and *Wynne* serjeant for the defendant, in *Hilary* term following, the short state of the verdict is,

That *George Paynter* being seised in fee of the freehold lands, and in reversion in fee of the copyhold lands in question expectant on the death of *Catherine Paynter* his mother, on the 26th of *September* 1750. by his will devised the freehold and copyhold to his son *George Paynter*, his heirs and assigns for ever ; but if he happen to die before he attain the age of 21 years leaving no issue, then he devises the premisses to his (the testator's) mother *Catherine Paynter* in fee.

That the testator died in *September* 1750. leaving issue *George* his only son and heir ; that *Catherine Paynter* widow, and mother of the testator, survived the testator, and afterwards died *January* 5, 1754.

That *George* the son and heir of the testator was also grandson and next heir to *Catherine*, and died *January* 6, 1754. before he attained the age of 21, and without issue.

That *Priscilla Larmer* the plaintiff's lessor was cousin and heir to *George Paynter* the devisee on the part of his father.

And that *Sarah* the wife of *William Searle* the defendant was sister and next heir of *Catherine Paynter*, and cousin and next heir of *George* the devisee grandson of the said *Catherine*, on the part of the said *Catherine*.

In

In arguing this case it was admitted and allowed that this was a good executory devise to *Catherine Paynter*; but for the plaintiff it was insisted, that the demise to *George* the son in fee, who was heir to the testator, was void, because it was only giving him what the law gave him; and therefore it was the same thing as if he had not been named in the will, and the executory devise could never have taken place so long as he had heirs; and many cases of executory devises lay it down that until the contingency happens, the estate shall descend to the heir. *Smith versus Clark, Salk. 241. S. C. Lutw. 797. Comyns 72.*

Taking it that *George Paynter* the devisee was *in* by descent of a fee, and that *Catherine Paynter* had an interest or possibility that was transmissible, according to the case of *Goodtitle of the demise of Gurnell versus Wood* in this court, *Trin. 13 & 14 Geo. 2.* upon the death of *Catherine Paynter* that interest, whatever it was, descended to *George* her grandson, and merged in his greater estate which he had by descent from his father; if this be so, then the lessor of the plaintiff, who is heir to *George* on the part of his father the testator, is intitled to recover.

Carth. 257. *as he was dead before Coll. J.*

On the other side it was insisted that an executory devise, as this most certainly is, is a descendible interest, and that *Catherine* and her heirs were *in* of such contingent executory and descendible interest, which could never descend to *George* her grandson, because while he was living, under age, and without issue, no man could possibly know whether he would die under age and without issue.

That *Catherine* and her heirs were the first purchaser, and whoever claims as heir by descent must shew himself of the blood of the first purchaser, but *Priscilla Larmer* is not of the blood of *Catherine*. *Finch 117. Hale's Hist. Com. Law, cap. Descents 239.*

It is objected for the plaintiff that *George* the grandson took an absolute fee-simple; but he certainly only took a conditional or determinable fee, otherwise the executory devise could not be good, which it is admitted on all hands it certainly is.

It is objected that in the case of *Smith versus Clarke*, that the heir *there* did not take by devise though it was on a condition; to this it may be answered that there was no devise over, so nobody to take advantage of the condition.

It is objected that the interest or contingency of *Catherine* upon her death descended to *George* her grandson, and so merged in his fee; to this it is answered that her interest was like a contingent

PART II.

K

remainder

remainder of a pure fee, which could not merge in one that was conditional.

In reply it was said for the plaintiff, that *Catherine* took a descendible interest like a contingent remainder in fee, which upon her death, until the contingency happened, descended to *George* her grandson, and merged in his fee, which was not a base fee.

Upon the first argument the court broke the case.

Willes Chief Justice. It may be proper to say something by way of breaking the case, but I would not be understood to be bound by any opinion I may now give, as it is to be argued again.

It was candid in my brother *Poole* to admit that this is a good executory devise; it certainly is so, and they are now settled known estates transmissible, and like to (though they are not) contingent remainders.

But brother *Poole* for the plaintiff insists, that although the estate is devised to *George* the grandson and his heirs upon condition, yet that it shall descend to him as if no condition had been mentioned. But I take it to be certain that it did not descend at the time of the death of the testator, but is devised to him upon condition that he and his heirs shall have it in case he lives to 21, or leaves issue; but if he does not, then the testator's mother and her heirs shall take; it does not say "*living the mother*:" and as to what is said that here is a merger, there never shall be a merger to hurt another. Does the plaintiff claim under the first devise? that is gone, for *George* the devisee died under age and without issue; if plaintiff claims under the executory devise, she must take as heir to *Catherine*, if at all; and that she cannot do, because *Pricilla Larmer* is not of her blood.

Clive Justice. I would be understood not to be bound by my present opinion. The lessor of the plaintiff claims by descent, and whoever does so, as hath been rightly insisted upon, must be of the blood of the first purchaser; the testator having carved out his whole estate in this manner, has thereby broke the descent; if *Catherine* had survived, her grandson she would have been a purchaser, for she would have taken it by devise from her son, and there would have then been no doubt at all but it would have gone to the defendant her sister; and I think it is the same thing notwithstanding she died before her grandson, and there can be no merger where the intent of the parties appears that the estate should not merge. *Lewis Bowles's case*, 11 Rep. 80.

Fees are every day in abeyance, as a remainder after an estate for life to the right heirs of J. S. I do not say a freehold can be in abeyance; the estate to *Catherine* seems to me to be the greater estate, and could not merge in *that* given to her grandson.

Birch Justice. The testator has not said any thing about the time of the death of *Catherine*, and as he has not, we cannot; here is an absolute executory devise in fee to *Catherine*, which must take effect in her or her heir on the death of her grandson under age and without issue; and I am of opinion with my Lord Ch. Justice, and my brother *Clive*.

Bathurst Justice. I shall be glad to have this matter argued again, because I think the son took by descent and not by the will: suppose the devise had been to *Catherine* after the death of *George* the testator's son under age and without issue, he would then certainly have taken by descent until the contingency had happened. Supposing then the son *in* by descent, I am inclined to think his grandmother's interest or estate shall descend to him, and he shall be in of a better estate, *viz.* a pure fee, which shall descend to his heirs *ex parte paterna*.

This case was argued a second time in *Hilary* term 29 Geo. 2. but little or nothing new was said upon it.

In *Easter* term 29 Geo. 2. the court were all agreed, and the Ch. Justice was ready to deliver their opinion, but deferred it, the parties being trying to make an end by way of accommodation. They were all of opinion for the defendant, *ut audiui*.

Michaelmas

Michaelmas Term

30 Geo. 2. 1756.

Lynall *versus* Longbothom. C. B.

A foot-race is a game within the stat. 9 Ann. against gaming. But it must appear that a man was playing at such game, or else a wager above 10l. laid upon his side, is not a betting within the statute. *Middlesex.* **T**HOMAS Longbothom late of the parish of Saint Andrew Holbourn in the county of *Middlesex* shoemaker, was summoned to answer Thomas Lynall of a plea that he render to the said Thomas Lynall the sum of 47*l.* of lawful money of *Great Britain*, which he owes to the said Thomas Lynall, and unjustly detains from him, &c. and whereupon the said Thomas Lynall by William Pryor Johnson his attorney says, for that the said Thomas Longbothom after the first day of May in the year of our Lord 1711, to wit, on the 11th day of November in the year of our Lord 1754. at *Westminster* in the county aforesaid, received to the use of the said Thomas Lynall the sum of 47*l.* being so much money lost at one time by the said Thomas Lynall to the said Thomas Longbothom within the space of three months next before the commencement of this suit, by betting on the side of one John Clarke, at a certain game called a foot-race, and which money so lost before the commencement of this suit was paid to the said Thomas Longbothom the winner thereof, whereby and by force of the statute lately made for the better preventing excessive and deceitful gaming, an action hath accrued to the said Thomas Lynall to demand and have of the said Thomas Longbothom, according to the form of the said statute, the said sum of 47*l.* so lost as aforesaid; yet the said Thomas Longbothom, although often requested, hath not paid to the said Thomas Lynall the said 47*l.* or any part thereof, but to pay the same to him hath hitherto refused, and doth yet refuse, whereupon the said Thomas Lynall saith that he is injured, and hath damage to the value of fifty pounds; and therefore he brings this suit, &c.

The defendant pleaded *nil debet per patriam*, which issue came on to be tried before Lord Ch. Justice Willes at the last sitting in *Easter* term 1755.

The facts proved at the trial on the behalf of the plaintiff, and upon which he relied to support his declaration were, That on th

2d day of *November* 1754. the plaintiff laid a wager with the defendant of 47*l.* to 29*l.* that *John Clarke* in the declaration mentioned *could not*, on that day, run four miles in 21 minutes and an half: that the plaintiff then deposited the 47*l.* in the hands of one *Thomas Cannon* as the stakeholder of that wager, and at the same time the defendant deposited 29*l.* in the same hands, which sums were to be paid to the winner of the wager; that the said *Clarke* did, on that day, run the four miles within 21 minutes and an half, and that thereupon the said *Thomas Cannon*, on the same day, paid the 47*l.* so deposited by the plaintiff, to the defendant *Longbottom*.

On the part of the defendant it was insisted by his council at the trial that the plaintiff had not proved his declaration, that this running by *John Clarke* was not a foot-race as described in the declaration; that it was not a game within the *stat. 9 Ann. c. 14.* upon which the plaintiff had founded his action; and that this wager was not a betting on the side or hand of any person playing at any game or games within that statute, and therefore the plaintiff was not intitled to a verdict upon this declaration.

Upon these objections there was a verdict for the plaintiff, subject to the opinion of this court, upon these three points, *viz.*

1st. Whether the running by *Clarke* alone was properly a foot-race, as laid in the declaration?

2^d. Whether such running be a game within the statute 9 *Ann. c. 14.*

3^d. Whether the wager was or was not, a betting on the side or hand of any person playing at any game or games within the said statute.

This case was argued in last *Easter* term by serjeant *Poole* for the plaintiff, and serjeant *Hewit* for the defendant, and in this term by serjeant *Willes* for the plaintiff, and serjeant *Prime* for the defendant.

For the plaintiff it was said, that *John Clarke's* running against time was a foot-race, and it is well known that a single horse has frequently run alone for the king's plate, which is still called a horse-race though he runs alone. Serjeant Poole.

2^{dly}. That a foot-race is a game within the *st. 9 Ann. c. 14.* though it is not mentioned therein, for the words, *other game or games*, shall relate to games or plays in former statutes against gaming; and foot-races are mentioned in the *stat. 16 Car. 2. c. 7.*

PART. II.

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between

between *Goodburn* and *Marley*, 2 *Stra.* 1159. horse-races were held to be within the statute 9 *Ann.* though not mentioned therein.

3dly. If this was a foot-race, and a foot-race be within the *stat.* 9 *Ann.* there is no doubt but the defendant betted on the side of *Clarke*, who ran against time.

Serjeant
Hewitt.

For the defendant it was admitted that a foot-race is within the *stat.* 9 *Ann.* and has been so determined; and it was said by the defendant's counsel, and agreed by the court, that although here were three questions made by the case for the consideration of the court, yet in truth they were all reducible to, and contained in this single question, *viz.* Whether the wager was a betting on the side of any person playing at a game called a foot-race? And they insisted that it was not, for it does not appear by the case but that *Clarke* might be running merely for his own diversion, or that he himself was at all concerned in the wager, or knew any thing of it; neither is it laid in the declaration, or stated in the case, that *Clarke* was *playing* at a game called a foot-race; so that if there had been no case stated, the judgment must have been arrested upon this declaration; for to bring it within the statute, it must be a betting on the side of a person or persons playing, and so it ought to have been laid.

Upon the first argument the court broke the case.

1159 *Willes* Ch. Justice. Neither of my brothers are distanced, so a second heat may be run, and therefore I give no opinion. As at present advised, I am inclined to think that this is not a foot-race as laid in the declaration, for *Clarke* might run for his diversion or exercise, and it does not appear he contended for any bett with any body, or against time; and *Clarke* can never be said to be *playing* unless it had been laid in the declaration, or stated in the case, that he was *playing*; and we can intend nothing, for I think this is a penal law: there is no doubt but horse-races are within the *stat.* 9 *Ann.* according to *Stra.* ~~1159~~ who is a faithful reporter; and foot-races must also be so too, for they are mentioned in *stat.* 16 *Car.* 2. to which the *stat.* 9 *Ann.* must relate.

Clive J. and *Birch* J. to the like effect.

Bathurst J. Courts of Justice have done very right in putting a liberal construction upon these statutes against gaming, and if it were possible, I should be for bringing this case within the *stat.* 9 *Ann.* One person running alone against time may be properly called a foot-race, as well as one horse starting alone to be an horse-race which has often been the case; but as it does not appear that

Clarke

Clarke was running for any wager, or knew any thing of this bett, or was at all concerned in it, and might for ought appears be running for exercise or his diversion, I fear it is not within the statute; it is like principal and accessory, if there be no principal there can be no accessory; so if there be no person *playing* at a game, there can be no betting within the statute.

Second argument. Serjeant *Wilkes* for the plaintiff.

The single question is, whether *Clarke* was *playing* at a game called a foot-race; for if he was, this wager is within the statute, it being above ten pounds; and a foot-race being now admitted to be a game within the act, the plaintiff must have judgment.

It was objected that it does not appear that *Clarke* was running against time, or was contending with any person, but might be running for his own diversion or exercise, so that he cannot be said to be playing at a game called a foot-race.

In answer to this it is stated in the case, that the plaintiff laid the wager with the defendant that *John Clarke* could not on that day run four miles in 21 minutes and an half; this shews clearly that he contended against time; and this running alone is undoubtedly a race, if the gentlemen of the turf may be allowed proper judges of what is properly a race, who always have held, that if one single horse walks round the course alone, and no other contends or runs with him, he wins the race; if therefore this be a race, no doubt but the betting thereon is within the statute. And although *Clarke* might be running against time for his own diversion, yet I contend that this betting upon his side is within the statute; as if two persons were playing a game at piquett, for no money, only for their own diversion, and a wager of above 10*l.* was to be laid on the side of one of them, such wager would be within the statute.

Serjeant *Prime* for the defendant.

I admit a foot-race is a game within the *stat. 9 Ann.* and has been so determined, but insist that *Clarke* was not *playing* at any such game, from any thing that is said either in the declaration, or case stated.

On the 2d. of *November*, 1754. plaintiff laid a wager of 47*l.* to 29*l.* that *Clarke* could not run four miles in 21 minutes and an half, does it follow from thence that *Clarke* might not be a porter, or a running footman, sent upon some message, and set forward either before or after the bett was laid; or might not the plaintiff and defendant see him setting forward upon full speed, not knowing whither

whither he was going, and the plaintiff lay the wager with the defendant that *Clarke* did not run the first four miles in 21 minutes and an half; this might be the case for any thing that appears; if so, surely this is not a betting upon a game: it does not appear that *Clarke* was at all concerned or interested in the event, so how could there be a betting upon his side; or, for any thing that appears, he might be interested to lose the wager, as many jockies have been; the court will intend nothing that is not stated in the case, so that if it is not clear that *Clarke* was playing at a game, there could be no betting on his side.

Judgment of the court. *Willes* Ch. Justice. We are all of opinion that judgment must be for the defendant,

It is agreed on all hands that a foot-race is a game within the *stat. 9 Ann.* and therefore the single question is, whether it appears that *Clarke* was playing at a game called a foot-race, for if he was, this was a betting within the statute; but it is neither laid in the declaration, nor stated in the case, that he was playing at a game called a foot-race, and we can intend nothing that does not appear, there must be a betting on the side of a person playing; and if no case had been stated, the judgment must have been arrested upon this declaration, because it is not laid that *Clarke* was playing; I think this is a penal law, and not merely remedial. As it does not appear that *Clarke* was playing at any game, there could be no betting on his side within the statute so the *poslea* must be delivered to the defendant, and he must have the costs of a nonsuit.

Raynard *o'm* Rex versus Chase. B. R.

1. Burr. 2. One advances a sum of money in the trade of a brewer, becomes a partner but does not meddle in the manual exercise thereof, is not within the *stat. 5 Eliz.* though he never served any apprenticeship.

INDICTMENT upon the *stat. 5 Eliz.* for exercising the trade of a brewer, the defendant not having served an apprenticeship of seven years; the jury found a special verdict, the substance whereof was, that the defendant was partner in the trade with a person who had served a regular apprenticeship to the trade, that the defendant advanced and paid a certain sum of money to become a partner, and was to stand to the profit and loss therein, but was not to intermeddle, and in truth did not intermeddle in the manual or working part of the trade. Upon the arguing of this special verdict the whole court were clear of opinion, that the defendant was not within the statute, which they said was made early in the reign of Queen *Elizabeth* to encourage manufacturers in trade, which was then in its infancy in this kingdom, and until trade became more flourishing it might perhaps be good policy to stick close to the letter of the statute; but about the end of that Queen's reign, when trade was much improved, the judges began to give a more liberal construction

construction of, and, in a great measure, to explain away the strict letter of the statute, which *law* is certainly in restraint of the common law, and of the freedom and liberty of the subject in general, who ought to be allowed to get their living in any honest industrious trade; and they also said, that although the words of the statute are, that a man shall not exercise a trade unless he has served as an apprentice in manner *aforsaid*, yet it has been over and over determined in *Westminster-hall*, that if a man has worked at a trade seven years as a journeyman with one master or several, either in this kingdom, or abroad, or as a master for himself seven years, he may afterwards exercise the trade, and is not within the statute; so may a woman follow the trade of her husband after his death, if she has been married to, and lived with him seven years, although, it may be, she never intermeddled in it in his life-time; and so it is (they said) in many such like cases. Lord *Mansfield* cited 4 *Leon.* 9. and said, that although that case is not law, yet it shews the judges towards the end of Queen Elizabeth's reign were willing to go as far as they could to explain away the penalty of this statute.

Judgment for the defendant *per totam curiam*.

Waterman versus Yea in Replevin. C. B.

Lyde, Esq; Sheriff of Somersetshire *versus* Lawrence and two others.

IN April 1755. *Yea* distrained the cattle of *Waterman* damage-If plaintiff in replevin be nonsuited for want of a plea in bar, the avowant may sue the sureties on the bond, and need not execute a writ of inquiry for his damages.

Upon the 7th of May 1755. *Waterman* levied his plaint against *Yea* in the sheriff's court, and removed it by *Re' fa' lo'*, and declared *here* in replevin in Trinity term 1755. for taking his cattle; to which *Yea* put in an avowry for damage-tenant, and *Waterman* not putting in any plea in bar, there was judgment by default for the avowant that the plaintiff be amerced, and that the avowant should have a *return' habend'*. *Yea* did not execute a writ of inquiry of damages, as he might have done by the *stat. 17 Car. 2. cap. 7.**

but rather chose to cause three actions upon the replevin bond to be brought against the plaintiff and his bondsmen, in order to force him to pay the avowant his damages and costs; whereupon serjeant

Hayward now moved on the behalf of *Waterman* and his sureties, that proceedings might stay in all the three actions, because the avowant might have recovered his damages and costs by executing a writ of inquiry, which he had omitted to do. 2dly, If the court should not think fit to stay the proceedings for this reason, that they

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might

* Sed quere, for the statute only extends to distresses for rent.

1 Ld. Raym.

97.

might be stayed upon payment of the single penalty of the replevin bond (which was ten pounds) into court.

Serjeant *Prime* for the avowant: This application is without precedent; the avowant in this case has two methods of proceeding in his election, *viz.* Either to execute a writ of inquiry, or to sue upon the replevin bond, the plaintiff not having prosecuted his suit with effect; and of this opinion were *Birch* and *Bathurst* justices, (only in court) and said, they could not interpose; whereupon *Prime* for the avowant offered to refer the damages and costs in the original action, and the costs in the actions on the replevin bond to be settled by the prothonotary, which the court thought was very fair and reasonable; and if the plaintiff would not comply therewith, the avowant to be at liberty to proceed as he thought fit on the replevin bond.

Hilary Term

30 Geo. 2. 1757.

Gardner *versus* Jessop an attorney. In C. B.

Assumpsit for
goods sold and
delivered.

IN *Trinity* term in the 28th year of the reign of his present Majesty, the plaintiff exhibited his bill against the defendant, in an action upon the case, and declared for 5*l.* upon an *indebitatus assumpsit*, and also for other 5*l.* upon a *quantum valebant*, which the defendant refused to pay, to the damage of the plaintiff of 10*l.* and thereupon he prayed relief, &c.

Non assumpsit
as to all ex-
cept 1*l.* 3*s.*
8*d.* and as to
that sum, that
he is liable to
be sued for it
in the county
court of Mid-
dlesex.

And the said *Thomas* in his proper person comes and defends the wrong and injury when, &c. and as to the promise and undertaking in the said declaration last mentioned, and also as to the promise and undertaking in the said declaration first above mentioned, except as to the sum of one pound three shillings and eight pence, parcel of the said sum of five pounds therein specified, says, that he did not promise and undertake in manner and form as the said *Jessop* hath above thereof complained against him; and of this he puts himself upon

upon the country, and the said *Josiah* doth the like; and as to the said promise and undertaking in the said declaration first above mentioned, as to the said 1 *l.* 3 *s.* 8 *d.* parcel of the said 5 *l.* therein contained, the said *Thomas* says, that the said *Josiah* ought not to have his said action in *this court* against him, by reason of the non-performance of the said promise and undertaking in the said declaration first above mentioned as to the said 1 *l.* 3 *s.* 8 *d.* because he says, that he the said *Thomas* at the time of the exhibiting the said bill of the said *Josiah*, and long before, lived and resided, and still doth live and reside within the county of *Middlesex*, that is to say, at *Enfield* in the county of *Middlesex*: and the said *Thomas* further says, that he the said *Thomas* always from the time of the promise and undertaking of the said *Thomas* in the said declaration first abovementioned, and supposed to have been made, as to the said sum of 1 *l.* 3 *s.* 8 *d.* parcel of the said 5 *l.* therein contained, hitherto hath been, and still is liable to be summoned to the county court of *Middlesex*, within the true intent and meaning of the statute made in the twenty-third year of the reign of his present Majesty, for preventing delays and expences in the proceedings in the county court of *Middlesex*, and for the more easy and speedy recovery of small debts in the said county court; and this he is ready to verify; wherefore he prays judgment if the said *Josiah* ought to have his said action in *this court* against him by reason of the non-performance of the said promise and undertaking in the said declaration first above mentioned, as to the said 1 *l.* 3 *s.* 8 *d.* parcel of the said 5 *l.* therein specified. *W. Hayward.*

And the said *Josiah*, as to the plea of the said *Thomas* above pleaded in bar as to the said 1 *l.* 3 *s.* 8 *d.* parcel of the said 5 *l.* in the said first promise and undertaking in the said declaration mentioned, says, that he, by any thing in that plea alledged, ought not to be barred from having his aforesaid action thereof maintained against the said *Thomas*, because he says, that in and by the said act of parliament mentioned in the said plea of the said *Thomas*, it is provided, that no person or persons shall be liable to be summoned to the said county court at the suit of any plaintiff or plaintiffs, other than such person or persons as was or were liable to be summoned to the county court of *Middlesex* before that act was made, and that *that* act should not extend to give the county court any jurisdiction to hold plea of, or to hear and determine any action, cause or suit, other than such action, cause or suit, as the county court of *Middlesex* might have held plea of, by plaint, before the making of the said act, as by the said act amongst other things more fully appears: and the said *Josiah* further saith, that the said *Thomas* before and at the time of the making of the said act was, and ever since hath been one of the attornies of the court of our Lord the now King of the Bench here; and therefore the said *Thomas* neither at the time of the making of the said act, nor at the

Replication
that the de-
fendant being
an attorney is
not liable to
be summoned
to the said
county court.

time

time of the exhibiting of the said bill of the said *Josiah*, was a person liable to be summoned to the said county court of *Middlesex*; and this he is ready to verify; wherefore he prays judgment and his damages in this behalf to be adjudged to him, &c. *W. Davy.*

Demurrer.

And the said *Thomas*, as to the said plea of the said *Josiah* above in reply pleaded to the said plea of the said *Thomas* above pleaded in bar to the said promise and undertaking in the said declaration first above mentioned, as to the said 1 l. 3 s. 8 d parcel of the said 5 l. therein contained, says, that the replication aforesaid, and the matters therein contained, are not sufficient in law for the said *Josiah* to have and maintain his said action in *this court* against him; to which said plea in manner and form aforesaid above in reply pleaded, the said *Thomas* need not, nor is he in any wise bound by the law of the land to answer; and this he is ready to verify; wherefore he prays judgment, and that the said *Josiah* may be barred from having his said action in *this court* against him; and for causes of this demurrer in law the said *Thomas*, according to the form of the statute in such case lately made and provided, shews to the court here these causes following, to wit, that the said replication is no answer to the said plea of the said *Thomas*, and is in itself incertain, repugnant, foreign and argumentative.

Continuance

And thereupon the said *Josiah Gardner* prays time to join in demurrer with the said *Thomas Jessop* here until *Thursday* next after the morrow of *All Souls*, and he has it, &c. The same day is given to the same *Thomas Jessop*, &c. at which day here come as well the said *Josiah Gardner* by his aforesaid attorney, as the said *Thomas Jessop* in his proper person; and the said *Josiah Gardner* prays further time to join in demurrer with the said *Thomas Jessop* here until *Friday* next after the octave of *St. Hilary*, and he has it, &c. (after several of the like countinuanes entered, the plaintiff in *Trinity* term 30 Geo. 2. joins in demurrer, and after continuances until this present *Hilary* term 30 Geo. 2. by *curia advisare vult*). This case was at last now argued by serjeant *Hayward* for the defendant, and serjeant *Davy* for the plaintiff; and after some time taken to consider, the court gave judgment for the plaintiff

Joinder in demurrer

And 1st, It was resolved by the court, that an attorney may be sued *here* for any sum under forty shillings, though it be ever so small.

2^{dly}, That an attorney cannot waive his *privilege*, because he is not allowed *it* in respect of himself, but for the sake of this court and the suitors here; and if he could waive his *privilege*, how doth the plaintiff know that he will waive *it*?

3dly, That the replication is well enough, although it doth not alledge *that the plaintiff ought not to be barred from having his action in this court.*

So the court over-ruled the demurrer, and said, the plaintiff might have what judgment was proper: *Quære*, whether it must be judgment in chief; or *quod defendens respondeat ouster*? for the court did not mention what judgment.

Jenkins on the demise of James Harris and Ann his wife *versus* Prichard and others. C. B.

UPON the issue not guilty in ejectment the following case was reserved for the judgment of the court, which states,

Whoever claims as heir by descent must make himself heir to the person last actually seised and in possession of the inheritance.

That this action is brought for recovering the possession of lands and tenements in the parish of *Michaelchurch Efsley* in the county of *Hereford*, that it appeared in evidence at the trial, that *David Smith* was seised in fee of the premises, and being so seised, by indentures of lease and release dated the 29th and 30th days of *August 1716*. made between the said *David Smith* of the one part, and *Rowland Prichard* and *Charles Price* of the other part, in consideration of 180*l.* paid to the said *David Smith* by *Sarah Madey* spinster, and in consideration of a marriage then intended to be had between the said *David Smith* and *Sarah Madey*, and for securing a maintenance for her in case she should survive the said *David*, and for settling and assuring the premises to the uses thereafter mentioned, and for other good considerations, the said *David Smith* did grant and convey the premises in question to the said *Rowland Prichard* and *Charles Price* and their heirs, to hold to them and their heirs to the uses following, (that is to say), to the use of the said *David Smith*, his heirs and assigns, until the said intended marriage should take effect; and from and after the solemnization thereof to the use and behoof of the said *David Smith* and the said *Sarah* his intended wife, for and during their natural lives, and the life of the survivor of them; and from and after the decease of the survivor of them, to the use and behoof of the heirs of the body of the said *Sarah* lawfully to be begotten by the said *David*, and for want of such issue, to the use and behoof of the said *David*, his heirs and assigns for ever.

An actual entry is not necessary to be made to avoid a fine without proclamations.

That the marriage was afterwards solemnized, and there was issue thereof one daughter named *Elizabeth*, and no other issue.

That in the year 1734. the said *Sarah* died, and in *February 1736*. the said *David* intermarried with one *Sarah Griffiths*, and by her had issue *Anne*, one of the lessors of the plaintiff, (now an infant), and no other issue; and the said *Anne* married the other lessor of the plaintiff before the demise laid in the declaration.

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That

That in *April* 1738. the said *Elizabeth*, the daughter of the said *David* by the said *Sarah* his first wife, intermarried with *John Waters*, and upon that marriage the said *David* delivered up the possession of the premises to the said *John Waters*, but did not execute any conveyance thereof to him.

That in *January* 1738. the said *David* died, leaving issue only *Elizabeth* by the first venter, and the said *Anne* by the second venter, and about 12 months afterwards the said *Elizabeth* died, leaving issue only one son (born after the death of *David* the grandfather) who died soon after the death of the said *Elizabeth* his mother an infant, and without issue; and the said *John Waters* held the premises till his death, which happened in or about the year 1743. and the said *John Waters* and *Elizabeth* his wife never did any act to destroy the said estate-tail vested in her.

That the said *David* had no brother, but left a sister (named *Jane*, who married *Job Gilbert*, and) who was heir at law to *Elizabeth* the daughter of the said *David* by the first venter, and to her son, and upon the death of the said *John Waters* the said *Job Gilbert* and *Jane* entred upon the premises, and being in possession in *Trinity* term in the 22d year of the reign of his present Majesty, levied a fine thereof without proclamations, and no actual entry was made by the lessors of the plaintiff to avoid such fine.

The defendants claim under the said *Job Gilbert* and *Jane* his wife; in *November* 1754. the lessors entred and made the lease to the plaintiff, and the defendants ousted them, as mentioned in the declaration; and upon the trial a verdict was found for the plaintiff, subject to the opinion of the court, whether the plaintiff ought to recover the premises, or any part thereof.

And if the opinion of the court shall be that the plaintiff ought to recover the whole premises, then the verdict is to stand, with liberty for the plaintiff to take out execution thereon; and if the court shall be of opinion that the plaintiff ought only to recover part of the premises, then the verdict is to be entred for the plaintiff for such part only, and as to the residue for the defendants: but if the opinion of the court shall be that the plaintiff ought not to recover any part of the premises, then the verdict obtained by the plaintiff is to be void, and instead thereof a judgment of nonsuit is to be entred up for the defendants.

The estate-tail being spent, the lessors of the plaintiff claim the reversion in fee of the whole premises in right of *Anne*, as heir to *David Smith*, or, at least, a moiety of the premises, as the reversion thereof, upon the death of *David Smith*, descended in moieties to his two daughters *Anne* and *Elizabeth*.

Upon

Upon the argument of this case two points were made; 1st. Whether the lessors of the plaintiff had any title at all? And 2^{dly}. If they had any title, whether an actual entry was not necessary to have been made in order to avoid the fine without proclamations?

As to the first point it was objected for the defendant, and adjudged by the court, (*absente Birch J.*) that whoever claims as heir in fee by descent must make himself heir to him that was last seised of the actual freehold and inheritance, that is to say, who was last actually in possession of the lands in fee-simple; and the reversion or remainder in fee (be it which it will) which was in *David Smith* and his heirs on the failure of issue in tail, is not such a seisin whereof there can be a *possessio fratris*, &c. and therefore *Anne* not being heir to the person last actually possessed of the fee, the court were very clear that the lessors had no title to any part of the premises.

As to the second point, the court adjudged that an actual entry is not necessary to be made in order to avoid a fine at common law, as this is, it being without proclamations. Judgment for the defendants. *Super et relapsi. vide 3 Pull. 2130. 658.*

Burslem versus Fern. C. B.

IMPRISONMENT. The defendant justifies under the sheriff's warrant directed to the goaler, and to one *Samuel Jordan* and the defendant *Josiah Fern*, upon a *capias* to take the defendant to answer *Jos. Jones* in a plea of trespass upon the case upon promise; the plaintiff replies, and traverses that the sheriff made such warrant directed to the goaler, *Samuel Jordan* and *Josiah Fern*; the defendant takes issue upon the traverse, and upon the trial before Mr. Justice *Denison* at the assizes in the Midland circuit, it appeared in evidence, that the attorney for *Jos. Jones* sent to the under-sheriff for a warrant upon the *capias ad respondendum* sued out against *Burslem*; that the under-sheriff sent to *Jones's* attorney a warrant thereupon directed to the goaler and *Samuel Jordan*, with a blank space for another bailiff's name; that *Jones's* attorney, without the privity or knowledge of the sheriff or under-sheriff, put in the name of the defendant *Fern* after the warrant was sealed and sent to him, at the instance and peril of the plaintiff *Jones*, as a special bailiff, who thereupon arrested *Burslem*, and carried him to goal for want of bail; it also appeared in many other counties this method of sending blank warrants by under-sheriffs to attornies who send for the same is often practised, especially in the northern counties, as Mr. Justice *Denison* himself said; and thereupon he was about to sum up the evidence, and direct the jury to find a verdict for the defendant;

False imprisonment.
An attorney fills up the sheriff's warrant on a *capias ad respondendum* after it is signed, sealed and sent to him with a blank, this is bad.

defendant; but at the pressing instance of serjeant *Willes* the point was saved, and a case stated, as above, for the opinion of the court, whether the issue was proved for the defendant.

It was insisted by serjeant *Hewit* for the defendant, that the issue was well proved for him, (and of that opinion was the Judge at the trial); that although the case states that the name of *Fern* was put into the warrant after it was sent to the attorney, without the privity or knowledge of the sheriff or under-sheriff, yet it doth not state that the attorney had not authority from the sheriff for that purpose, and the general usage of delivering out blank warrants to attornies authorizes this practice; the same kind of practice prevails in other cases, the filacers give out blank writs, and the plaintiff's attorney constantly fills them up after they are signed and sealed; marriage licences are given out to surrogates, *blank*, and filled up by them after they are sealed, and *so*, in many other instances; the *stat. 6 Geo. 1. c. 21. s. 53.* which recites, that whereas under-sheriff's deliver out blank warrants and other warrants, &c. to attornies for arresting persons without having any writ, &c. doth not condemn the practice of delivering out blank warrants, but seems to allow the same, and only condemns the delivering out of blanks, or any warrants by the sheriff before he hath received the writs. In a *Westmorland* case in *B. R.* upon a motion by way of complaint against an attorney for filling up a warrant after it was sent to him exactly like the present case, the court did not censure the attorney but said it was the constant usage; (this was mentioned by Mr. *J. Denison* at the trial.)

On the other side it was said by serjeant *Willes* for the plaintiff, that if this practice be permitted to go on, it will be of bad consequence, for then, instead of sheriff's officers who give security to do their duty, plaintiff's attornies may put into warrants men of infamous characters, who may be guilty of great oppressions; and formerly the persons who executed process were duly sworn and admitted for that purpose, to prevent oppression.

Per curiam (absente Birch J.) We have no doubt but this practice ought to be condemned, and although we do not punish attornies for it by granting attachments against them upon complaints, yet we constantly discharge the party arrested by such warrant out of custody. Such warrant is always held to be illegal, and if *Bursem* had killed *Fern* in resisting him, it would not have been murder, because *Fern* had no legal warrant to arrest him; and a parcel of sailors who were tried before Mr. Justice *Batburst* for killing a bailiff who had such a warrant as the present for arresting one of them, were acquitted of murder. As to the *stat. 6 Geo. 1. c. 21. s. 53.* we think it rather condemns blank warrants than otherwise; but

but if it does not, it leaves them as before the statute was made, and we think such warrants were always bad; as to filacers they are officers for that purpose, and they may authorise attornies to fill up their writs; as to surrogates we do not know what they do, but we are all very clear that the defendant has not proved his issue, and there must be judgment for the plaintiff

Villers *versus* Handley. C. B.

DEBT upon a bond for 52*l.* 16*s.* against the heir of the obligor; the defendant confesses the bond and debt, and pleads that he has nothing by descent but a small cottage in *Tamworth*, except a reversion after a term of 500 years, commencing the 16th of *October* 1746. now to come and unexpired; and this he is ready to verify; to this plea there is a general demurrer, which was argued by serjeant *Willes* for the plaintiff, and serjeant *Hewitt* for the defendant.

For the plaintiff it was objected, 1st, That the plea is ill in substance, because it is not alledged therein that the lease for 500 years is by deed, nor that the lessee by virtue thereof entred, and if the lease for 500 years be without deed, it is void by the statute of frauds and perjuries *; and of this opinion was the court (*Clive* and *Bathurst* Justices only present), and upon this point gave judgment for the plaintiff.

A reversion after a term for 500 years must be pleaded to be by deed.

* But quere as to this, and see *Farmer of the cemise of Earl against Rogers*, ante Trin. 28 & 29 Geo. 2. C. 1. seems contra. Lil. Ent. 180.

Vide 1 Stra. 665.

Vide 1 Ro. Rep. 57.

2^{dly}, It was objected that a reversion after a term for years is not pleadable in this manner, but the defendant in this case ought to have admitted assents; and cited *Smith* and *Angel*, 2 *Ld. Ray.* 783. and *Salk.* 354. S. C. where *Holt's* opinion is, that the heir could not plead a term in delay of present execution, but ought to confess assents, (notwithstanding there are some precedents otherwise, that he may), for the reversion is assents, and the common law had no regard to a term for years; and there is no mischief in this, for tho' in consequence a *levari* may go, yet a lessee may maintain himself against an ejectment by virtue of his lease; and of this opinion was the court now in the present case; but they declared they gave judgment for the plaintiff upon the first point.

But *quere* how the judgment is entred, whether general or special?

Practice.

Shipman *versus* Stevens, C. B.

Where the defendant is an infant the plaintiff ought to apply to him to name his gaurdian, and in default thereof, the plaintiff must apply to the court to oblige defendant to do.

ASSAULT and battery, whereby the plaintiff lost her leg. The defendant being served with a *capias ad respondendum*, did not enter his appearance at the proper day after the return thereof, therefore the plaintiff's attorney made an affidavit of the service, entred an appearance for the defendant according to the statute in person, left the declaration in the office, gave notice to the defendant thereof, and to plead; whereupon the defendant employed Mr. *Waldo* an attorney of *B. R.* to take the declaration out of the office and plead the general issue, who did so in the name of one *Palmer* an attorney of *C. B.* Thereupon the plaintiff's attorney made up and delivered the issue, gave notice of trial, set down the cause, subpoenaed witnesses, and gave briefs to his counsel; but when the cause was just coming on to be tried, the plaintiff's attorney discovered that the defendant was an infant of about 17 years old, so that he ought to have appeared and pleaded by guardian; and therefore if the plaintiff had proceeded to trial and judgment upon this record, it would have been error.

Wherefore it was now moved on behalf of the plaintiff, that the defendant or his attorney might shew cause why the appearance in the filacer's book should not be struck out, and the defendant be obliged to appear and plead by his guardian, and why the record should not be amended conformably thereto, and why the plaintiff should not have his costs occasioned by the defendant's attorney, who must be supposed to know his client was an infant, and so had led the plaintiff's attorney on to proceed thus far erroneously; upon an affidavit of these facts, and that Mr. *Waldo* was a trustee for the defendant in a settlement, and must know he was not of age, when he pleaded.

On shewing cause for the defendant it appeared by affidavit, that Mr. *Waldo* acquainted the plaintiff's attorney that the defendant was an infant, but this was after the plea pleaded, and he not believing it, proceeded so far as abovesaid.

Per curiam: In this case the plaintiff's attorney ought to have applied to the defendant to name a guardian, and if he did not do so in six days, then plaintiff ought to have applied to the court to oblige him so to do; and it was the plaintiff's attorney's own fault to proceed erroneously, although no notice had been given to him that the defendant was not of full age; and if the plaintiff had proceeded to judgment, and error had been brought, and afterwards the plaintiff had moved here to have made the record right, this court would

would not have done it; and therefore as to costs there is more reason that the plaintiff should pay costs for being permitted to have the record made right, than that the defendant should pay costs to the plaintiff; however as costs have not been prayed by the defendant, let the defendant plead by guardian in six days, and let the record be made agreeably thereunto without costs of either side. Serjeants *Prime, Willes, and Davy* for the plaintiff, *Hewitt* for the defendant. *Absente Capital' Justic' Willes.*

Easter Term

30 Geo. 2. 1757.

Cope versus Marshall & al'. B. R.

Bar. 260

THE record is of *Hilary* term in the 27th year of his present Majesty, Roll 145. The declaration contains nine counts, but as the question debated arose singly on the 8th count, it will be only necessary to write *that* down, which is thus, *viz.*

And also that they the said *Charles Marshall, W. E. J. M. J. W. T. W. J. S. W. T. J. V. W. S. and W. H.* on the 11th day of *June* in the year of our Lord 1753. and on divers other days and times between that day and the day of exhibiting this bill, with force and arms broke and entred the close and free warren of the said *John Cope* called *Sugar's Lodge Warren*, otherwise *Copes's Warren*, at the parish of *Rugeley*, otherwise *Rudgely*, otherwise *Ridgely* aforesaid in the said county of *Stafford*, and trod down and consumed with their feet in walking the grass of the said *John Cope* there growing of the value of twenty pounds, and the soil of the said *John Cope* there, to wit, five acres of his soil did turn up and subvert with shovels, spades, corves, pickaxes and mattocks, and did dig up, fill up and destroy divers coney burrows, to wit, 1000 coney burrows then and there made and kept up for the harbouring and breeding of conies and the conies then found in the same close

Declaration
in trespass for
digging up
coney bur-
rows in the
plaintiff's soil

close and free warren, to wit, 1000 conies of the value of fifty pounds, did take and carry away, and converted and disposed thereof to their own use, and other injuries to the said *John Cope* did, against the peace of our Lord the present King, and to the damage of the said *John Cope* of 100*l.* and therefore he brings suit, &c.

Not guilty to the whole. And a justification by the defendant as having a right of common and that the same was surcharged with conies to the nuisance of the defendant, and therefore he abated the nuisance.

And the said *Charles* (and other defendants) plead first the general issue Not guilty to the whole, and thereupon issue is joined; and by leave of the court here for this purpose to them granted, according to the form of the statute in such case lately made and provided, for further plea, as to breaking and entering the close in the said declaration mentioned, called *Sugar's Lodge Warren*, otherwise *Cope's Warren*, and treading down and consuming the grass there lately growing with their feet in walking, and the turning up and subverting with shovels, spades, corves, pickaxes and mattocks the said soil there, and digging up, filling up, destroying and spoiling the said coney burrows there made and kept up for the harbouring and breeding of conies, above supposed to be done, say, that the said *John Cope* ought not to have or maintain his said action thereof against them, because they say that the said *Charles* at the said several times when, &c. and long before, was and still is seised in his demesne as of fee of and in divers, to wit, twenty acres of land, with the appurtenances, lying and being in the parish aforesaid, and that the said *Charles*, and all those whose estate he hath, and at the said several times, when, &c. had of and in his said land, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and have used and been accustomed to have, and of right ought to have had, and the said *Charles* still of right ought to have common of pasture in and upon the said close called *Sugar's Lodge Warren*, otherwise *Cope's Warren* in which, &c. for all his and their commonable cattle levant and couchant on the said land now of the said *Charles*, with the appurtenances, every year at all times of the year, at his and their wills and pleasures, as to the said land now of the said *Charles*, with the appurtenances, belonging and appertaining; and the said *Charles*, *William Emery*, *J. M.* (and the other defendants) further say, that the said coney burrows in the said declaration mentioned, before the said several times when, &c. had been wrongfully and injuriously made, and at the said times when, &c. were wrongfully and injuriously kept up and continued for the harbouring and breeding of conies in the last mentioned close, called *Sugar's Lodge Warren*, otherwise *Cope's Warren*, in which, &c. and the conies, to wit, 10000 conies harboured and bred in those coney burrows at the said times when, &c. eat up and fed on the grass in that close growing, by means of which the said common at the said times when, &c. was surcharged, to the great nuisance of the said *Charles* in the enjoyment of his said common of pasture, so that the said

Charles

Charles at the said times when, &c. could not have and enjoy his last mentioned common of pasture in the said close called *Sugar's Lodge Warren*, otherwise *Cope's Warren*, in which, &c. in so beneficial a manner as of right he ought to have had and enjoyed the same; therefore the said *Charles* in his own right, and the said *W.E. J. M.* (and other defendants) as his servants, and by his command, in order to abate the said nuisance, and to prevent the continuance of the increase of conies there, at the said several times when, &c. entered the said close called *Sugar's Lodge Warren*, otherwise *Cope's Warren* in which, &c. and with shovels, spades, corves, pickaxes, and mattocks dug up, filled up, destroyed and spoiled the said coney burrows so there wrongfully and injuriously made, kept up and continued for the harbouring and breeding of conies, and thereby did abate the said nuisance, as it was lawful for them to do; and in so doing they the said *Charles* (and others) did necessarily and unavoidably tread down and consume with their feet in walking a little of the grass there then growing, and did necessarily turn up and subvert with the said shovels, spades, corves, pickaxes and mattocks the said soil there, doing as little damage as on that occasion they possibly could, which are the same breaking and entering the said close in the said declaration mentioned, called *Sugar's Lodge Warren*, otherwise *Cope's Warren*, and treading down and consuming the said grass there lately growing with their feet, in walking and turning up and subverting with shovels, spades, corves, pickaxes and mattocks the said soil there, and digging up, filling up, destroying and spoiling the said last mentioned coney burrows there made and kept for the harbouring and breeding of conies there, whereof the said *John Cope* hath above thereof complained against them; and this they are ready to verify; wherefore they pray judgment if the said *John Cope* ought to have or maintain his said action in that respect against them, &c.

To this plea the plaintiff has demurred generally, and the defendants have joined in demurrer.

There was a verdict for the plaintiff upon the general issue, and afterwards this demurrer was several times argued before Lord C. J. *Ryder & sociis suis*, and it was argued in this term before Lord C. J. *Mansfield & sociis suis* by Mr. *Moreton* for the plaintiff, and Mr. *Aston* for the defendants.

In support of the demurrer and to shew the plea was bad, several cases were cited: First, *Coney's case*, *Codb.* 122. 4 *Leon.* 7 S. C. where the plaintiff declared in trespass for digging the plaintiff's close, and killing 18 conies there; the defendant pleaded as to all the trespasss but killing of two conies Not guilty; and as to killing the two conies justifies as having a right of common, and

PART. II.

P

that

that he found them eating the grafs, and that he killed them; judgment for the plaintiff: to this it was answered by the counsel for the defendant, that the case cited is not applicable to the present case, for the plea now under consideration does not justify the killing of conies.

The second case cited for the plaintiff was *Bellew versus Langdon*, *Cro. Eliz.* 876. and *Owen* 114. S. C. which was trespass for killing conies; the justification is the same as the case in *Godb.* and the same judgment, so the counsel for the defendant submitted the same answer, that this case is not applicable to the present.

The third case cited for the plaintiff was *Haddefden versus Gryffel*, *Cro. Jac.* 195. *Yelv.* 104. S. C. which was trespass *quare clausum fregit*, and took, killed and carried away conies; the defendant justifies, for that he is seised in fee of a messuage and land, and had common by prescription appertaining thereto in the place where, &c. and that he was ready to use his common, and many conies being there *damage feasant* and spoiling the grafs, he entred to chase them out lest they should increase; the plaintiff demurred, and after argument the court adjudged that the plea was not good, for the commoner has nothing to do with the land but to put in his cattle, and may not meddle with any thing of the lord's there, and if the lord surcharge the common, the commoner shall have an assise or an action on the case; and he may not kill the conies, for so long as they are on the land of the lord they are his property; and when the defendant shews that his intent was to enter to chase the conies, that entry was tortious; and so there was judgment for the plaintiff. The counsel for the defendant now admitted this case was good law, but said it was not like the case at bar.

The fourth case cited for the plaintiff was *Sir Jerome Horsey versus Hagberton*; the question was, whether a commoner may cast down and fill up coney burrows which were made in the common waste where he was to have common; and this being pleaded in justification, and a demurrer thereupon, it was resolved and adjudged without argument, that the commoner had not any other interest than to take the common by the feeding there of his cattle; and may not destroy the conies nor coney burrows; wherefore without argument it was adjudged that the plea was not good. In answer to this case it was observed by the counsel for the now defendants, that the case cited was determined without argument and is so mentioned by the reporter twice. 2dly, That it does not appear what the nature of the justification was; and it might be a justification merely by the defendant, as having a right of common, without stating or alledging any surcharge; and if so, the case was admitted to be law; and that this was the nature of the justification is most probable, or otherwise it would have been further stated;

and the defendant's counsel agreed that the lord may lawfully erect coney burrows on the warren, and may encourage the increase of conies, so that he do not surcharge the common, but when *that* is done, the coney burrows (it was insisted) were a nuisance; and they said that in the present plea the surcharge is insisted upon, and that the erection of the coney burrows was the cause of such surcharge, which is admitted by the demurrer; and therefore the present case is very different.

The fifth and last case cited for the plaintiff was, 2 *Bull.* 116. *Carril versus Pack and Baker*, 1 *Brownl.* 227. S. C. trespass *quare clausum & liberam warrennam fregit & intravit*, and for digging the ground, &c. The defendants plead Not guilty, except as to entering the warren, chasing the conies, and digging the land; and as to chasing the conies and digging the land they justify, as having a right of common; that the plaintiff's father stored the place with conies; that the plaintiff made new holes, by reason whereof defendant's sheep often fell into them, and so were hurt; by reason whereof defendant with ferrets chased the conies, and digged down the burrows, and filled up the holes for the better preservation of the common; demurrer to the plea, and judgment for the plaintiff. To this case it was answered by the defendant's counsel, that the judgment was given upon the insufficiency of the plea, and, as it seems, principally upon this reason, because the defendant hath not denied but admitted the free warren; for *Crooke* Justice says, "If the plaintiff hath a free warren, the defendant cannot justify the killing the conies." (*Haughton* Justice) Coney burrows are incident to a warren; and *per Dodderidge* Justice, If the defendants had pleaded Not guilty to the trespasss in the warren, this had been then well pleaded, and the plaintiff must then have made it appear to the court that he had a free warren; but by this plea they have confessed that he had a free warren; so the court was clear of opinion that the justification was not good, and judgment was entered for the plaintiff. According to the report of this case by *Brownl.* as of *Trin.* 11 *Jac.* 1. the suit was held to be discontinued by reason of a defect in the pleading, and so no judgment given in this case on the merits. The pleading stood thus: declaration in trespasss for breaking the plaintiff's free warren, digging his land, and chasing his conies, and taking them. Defendants to all except entering the warren, chasing the conies, and digging the land, plead Not guilty; then as to digging and chasing the conies they justify, and say nothing as to the entering the warren neither by confession nor traverse, and so all was discontinued; and cites 4 *Rep. Harleken's* case: this arose from an objection taken by Mr. Justice *Haughton*, of which some mention is made in the report of this case in *Bullstrode*; but however this may be, supposing the judgment to be given on the merits for the plaintiff as reported by *Bullstrode*, that determination (the defendant's counsel insisted) cannot affect the case

case now at bar, for here the defendants have pursued the advice of Mr. Justice *Dodderidge*, and have justified entring into the close, but (by the general issue to the whole) have denied the entring into the free warren, so that the present justification does not admit the close to be a free warren, and therefore the reason given for the insufficiency of the plea doth not hold in the present case; that coney burrows are incident to a warren doth not shew this justification to be bad, which does not admit the place in which, &c. to be a warren. But it was submitted by the counsel for the defendants, that this case was rather an authority *for*, than against them; for in the argument thereof by Sir *Robert Hitcham* in support of the justification, he agreed that killing of conies was not justifiable; that in *Simon de Harcourt's* case, 1 *H. 8. fo. 15.* which was trespass for digging a trench upon the common, which the commoners justified to prevent the common being annually overflowed, in which case the court were divided in opinion two against two: the Chief Justice went upon this difference, where the commoner meddles with the soil *de novo*, and where he only reforms a misfeasance; in the case of *Simon de Harcourt* the commoner meddled with the soil *de novo*; but if the tertenant do inclose, the commoner may pull down, because this is only done to reform a misfeasance. If the lord do make a pond upon the common, if the commoner notwithstanding this hath common sufficient, this is good; but if all the common be taken up in the pond, they may lawfully let out the water, and so enjoy their common, and this they may well justify; and cites the same case. Then he insists that the tertenant ought not to take advantage of his own wrong, and that it is lawful for every man to remove what is hurtful or a damage to him. After this argument the court determined the case of *Carril versus Pack and Baker*, upon the reason that it was charged in the declaration that the defendants had broke the plaintiff's free warren, and done the trespass complained of there; and this was admitted by the justification; and therefore the court were of opinion that the justification was bad, because coney burrows are incident to a warren; from hence (the now defendant's counsel submitted) may be very fairly drawn this almost necessary consequence, *viz.* That if in that case the defendants had pleaded Not guilty to the *trespass in the warren*, the justification had been good; for Mr. Justice *Dodderidge* expressly says, if the defendants had pleaded Not guilty to the trespass in the warren, *this had been then well pleaded*, and the plaintiff must then have made it appear to the court that he had a free warren, but by this plea they have confessed he had a free warren; in the case at bar the free warren is denied by the general issue, and therefore the defendant's counsel now submitted to the court that this case cited by the plaintiff is a strong authority for the defendants.

They

They who argued for the defendants did not deny the authorities cited for the plaintiff, nor dispute the principles upon which those cases are founded, but contended that the plea in the case at bar may be good consistently with those principles; and to distinguish this from all the cases cited for the plaintiff as to the interest of the commoner, it was first admitted by the defendant's counsel, that his interest consists in the feeding on the herbage, and that he has no other interest in the soil; that the lord or owner of the soil may feed the herbage with his cattle, and is not restrained to any species of cattle, but may depasture it with beasts of warren; that the commoner has no right to distrain, chase or kill the beasts of the lord; these are the general rules which they (for the defendants) said they did not dispute, but submitted to the court that these rules admitted of some exceptions or restrictions, and that although the lord may put what species of cattle he pleases upon the common, or may use the soil in what manner he pleases as his own soil, yet that must be understood *sub modo*; that he uses the soil or feeds the herbage with cattle in such manner as may be consistent with the rights of the commoners; and here this rule of law ought to be observed, *sic utere tuo ut alieno non lædas*; and therefore it was contended, and insisted by the defendant's counsel, that if the lord or owner of the soil puts such a number of cattle upon the common so as to surcharge it, that is to say, if by means of such number of cattle turned on by the lord the commoner has not a sufficient common of pasture for the cattle, he has a right to feed on the common, or by means of any erections on the common, the commoner is disturbed, hindered or restrained in the enjoyment of his right, so that he cannot enjoy his common in so ample and beneficial a manner as he has a right to do from the nature of his grant, custom or prescription; these are injuries done to the commoner, and which the law calls nuisances, and for which the commoner has a right to a redress by law; and there are a variety of cases in the books to prove this. Then they stated the plea, the facts wherein disclosed, are admitted by the demurrer, so that it appears that an injury has been done to the commoners by the making and continuing of the coney burrows, which is the cause of the surcharge upon the common; if this be an injury, the commoner has a right to redress; but how and in what manner *is the question*, whether by abating the cause of the nuisance, or by an action against the lord. It was insisted for the plaintiff that the remedy is by action only, and that the defendant has no right to abate it, and by taking this method or course of redress is a trespasser; and this is the substance of what has been contended for on the part of the plaintiff; but what is now insisted upon on the behalf of the defendant is,

Interest of the commoner.

Interest of the lord.

Commoner cannot chase or kill the lord's cattle.

Lord's use of the soil sub modo.

He ought not to surcharge,

nor make erections.

These are nuisances, and the commoner to have redress.

But in what manner is the question.

May abate the nuisance.

That the abatement of the cause of the nuisance, as in the present case, is a legal method of redress; that it is agreeable to the

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reason

reason and policy of the law, and that by pursuing this course the defendants are not trespassers, but that their plea contains a legal justification; that this is a legal course of redress, and agreeable to the reason and policy of the law, appears from hence:

Nuisances are public or private.

Nuisances are considered either as public or private nuisances; public nuisances are such as affect the public, all the King's subjects, as the stopping up an highway; private nuisances are such as only affect certain particular persons.

Public.

Public nuisances may be abated by any of the King's subjects, but no action will lie by a private person for a public nuisance, because this would tend to create an infinite number of suits, one man being as well intitled to bring such action as another.

Private.

General rule as to nuisances.

Private nuisances may be abated by the persons injured by them, or the party injured may bring his action to recover damages for the injury he sustains; and this is the general rule of law with respect to nuisances; and how the case at bar comes to differ from that general rule of law, the defendants counsel were at a loss (as they said) to understand, that the party in this case of a private nuisance may bring an action to recover damages, but cannot abate it; for if there is any reason to differ this from all other cases of private nuisance, the rule to prevail according to the general reason and policy of the law ought to be the very reverse, *viz.* That these kind of nuisances may be abated, but that no action would lie; for if actions are to be brought by every person injured by this kind of nuisance, it must tend to create a multiplicity of suits, for every commoner has the same right of action as another; and in the case before the court may produce thousands of suits.

Abating the nuisance in this case most reasonable.

Besides, abating the nuisance in this case is the most reasonable, proper, and most adequate course of redress; by an action on the case against the lord the commoner can only recover damages, but such action will not reform the nuisance; that notwithstanding such action the nuisance continues, and by the continuance of a private nuisance pending an action, a person might in some cases suffer irreparable injury; therefore the abating the nuisance is the most reasonable and proper course of redress, and best adapted to the nature of the injury.

But that this course of redress should not be lawful in this particular case of a private nuisance, and yet allowable in all others, (as was contended for on the side of the plaintiff) is neither agreeable to common sense and reason, nor to the reason and policy of the law; and therefore the defendant's counsel now took into consideration the reason upon which this distinction, this exception to the general

general rule of law, is contended for on the other side; and it is only this, *viz* That the commoner has no interest in the soil, is not to meddle with the soil of the lord, all he has to do is to take the grafs with the mouths of his cattle. In answer to which the defendant's counsel insisted, that the commoner's having no interest in the soil, is no reason why he may not enter into the common and dig the soil to abate a nuisance; for if I have a close lying contiguous to another close through which a watercourse runs, and my neighbour makes a dam across the watercourse by which my close is overflowed, surely I may enter into my neighbour's close and dig up the dam in order to abate the nuisance, and *that*, although I have not, nor claim to have, any kind of interest in the soil; this is every day's practice in justifications for abating of nuisances, and is so well known and established that there is no need to cite authorities to prove it. 2 *Inst.* 405, 6. That the party injured may enter into the land of the wrong-doer to abate the nuisance, whether it be in his own possession or in the possession of his alienee; and to the like purpose are many cases put in the year-book, 9 *Ed.* 4. 35. If a watercourse to my mill be diverted by making a ditch in another man's soil, I may enter and fill up the ditch; this cannot be disputed, and therefore it may be fairly concluded, that in the present case the commoner may lawfully abate the nuisance. A right of common is certainly an interest in the produce of the soil, though not in the soil itself, and is such an interest as gives the party a remedy to recover (if deprived of it) by an assise; it is such an interest as enables the commoner to distrain the cattle of strangers depasturing the grafs as damage-feasant; it is such an interest as enables the party to abate a nuisance erected to his prejudice in the enjoyment of his common, as appears from the case of *Mason versus Caesar*, 2 *Mod.* 65. which was trespass for pulling down of hedges; the defendant pleads that he had a right of common in the place where, &c. and that the hedges were made upon his common, so that he could not *in ea parte* enjoy his common *in tam amplo modo*, &c. and so justifies the pulling them down; and upon a motion in arrest of judgment after a verdict for the defendant, the court were of opinion that the defendant might abate the hedges, for thereby he did not meddle with the soil, but only pulled down the erection; the same point laid down 15 *H.* 7. 10 *b.* *Bro. tit. Common*, p. 9. 2 *Inst.* 88. these cases were strongly insisted upon as in point for the now defendants. The erection of the hedge to enclose part of the common by the lord or owner of the soil is not in itself an unlawful act; the lord as general owner of the soil may lawfully inclose and hold in severalty, leaving sufficient pasture in the residue of the common for the cattle of persons having a right of common, and that of common right by the common law, and not as frequently understood, by virtue of the statute of *Merton*, which (it was said) is only declaratory of the common law; the injury and nuisance

nusance therefore becomes such by inclosing so much of the common as to deprive the commoner of the enjoyment of his right of common; so the erecting of coney burrows is not of itself unlawful in the lord as owner of the soil, but as they are the means and occasion of a surcharge on the common, so as to prejudice the commoner in the enjoyment of his right of common; the injury is the same in both cases, and therefore the redress ought to be the same.

The counsel for the defendants concluded that there is not one case of authority, or any principle of law that will support the doctrine contended for by the plaintiff; but on the contrary, the first principles of law and common sense tell us, that it is lawful for every man to remove what is hurtful to himself; that every nusance of every kind whether private or public may be removed by the person injured by it; that the coney burrows in the present case are a nusance to every commoner, as being the cause of a surcharge, which is an injury to the right of the commoners; that though the surcharge is the immediate injury, yet the coney burrows being the cause of its being so, are removable as a nusance; as the erecting of a dam across a watercourse is not the nusance but the cause of it. The erection of the coney burrows is surely *ad nocumentum* of the commoners as being the cause of the surcharge, and as a nusance, by every rule and principle of law may be abated and removed.

Upon a former argument of the case at bar *Denison* Justice took an objection to the plea, that the defendant did not thereby alledge that by the increase of conies he was deprived of a sufficiency of common; and cited 1 *Lutw.* 101. *Hassard versus Cantrell*. In answer to that objection it was now said by the defendant's counsel, that the defendant, by his plea alleges that the common was surcharged by the conies; that the word *surcharge* is a technical term, and, in law, understood to mean (when applied to the lord) that he has not left a sufficiency of common to the tenants, who have common right; and the plea avers, that the defendant could not have and enjoy his common of pasture in so ample and beneficial a manner as of right he ought to have had and enjoyed it; and that beneficial manner, that, of right, the commoner ought to enjoy his common, with respect to the owner of the soil is only sufficiency of common; and when it is alledged that he cannot have and enjoy such common as he ought, of right, to have, it is the very same as to aver that he could not enjoy a sufficiency of common. With respect to the case in 1 *Lutw.* 101. which was an action upon the case by a commoner against the lord and owner of the soil of a waste, for putting into the waste divers cattle, and for erecting coney burrows and feeding the grafs with conies, whereby the plaintiff could not enjoy his common *in tam amplo & beneficiati modo*

modo & forma as before; it was objected for the defendant, that the plaintiff had not charged the defendant with any surcharge of the common, but only that thereby he the plaintiff could not enjoy his common, &c. In answer to this the counsel in the case at bar said, that the present case is very different from that in *Lutw.* for the plaintiff here is charged with an actual surcharge in terms, and it is alledged that thereby the defendant could not enjoy his common of pasture in such manner as by right he ought to have done. But notwithstanding this good argument for the defendants, judgment was given for the plaintiff upon the merits; the objection to the plea was given up.

Filewood *versus* Popplewell and Turner. C. B.

Cooke. **HILARY** term in the 30th year of the reign of King George the second. Elsewhere as it appears of *Easter* term last past upon the 308th and 309th Rolls it is thus contained: *Middlesex*, to wit, The sheriff has been commanded, that whereas on the 25th day of *October* in the year of our Lord 1755. *Thomas Popplewell* of *Carnaby-street* in the parish of *Saint James Westminster* hofier, came in his own person before *Henry Bathurst*, Esq; then and still one of the Justices of our Lord the now King of the Bench here at his chambers situate in *Serjeants-Inn* in *Chancery-lane*, and acknowledged himself to owe to *James Filewood* the sum of 12 *l.* which said sum of 12 *l.* he the said *T. P.* for himself and his heirs did will and grant to be made of his lands and chattels, and to be levied to the use of the said *J. F.* And on the 12th day of *November* in the year aforesaid *Richard Turner* of *Kings-street* *Saint Margaret's Westminster* victualler, came in his own person before the said *Henry Bathurst*, then and still one of the said Lord the King's Justices of the Bench here at his chambers situate in *Serjeants-Inn* in *Chancery-lane* aforesaid, and acknowledged himself to owe to the said *James Filewood* the sum of 12 *l.* which said sum of 12 *l.* he the said *R. T.* for himself and his heirs did will and grant to be made of his lands and chattels, and to be levied to the use of the said *J. F.* under the condition following, that is to say, that one *John Smith* should appear in the King's said court of the Bench here in his proper person, or by his sufficient attorney to a certain original writ in a plea of trespass upon the case to the said *J. F.* his damage of 16 *l.* to be brought by the said *J. F.* against the said *J. S.* before the end of two terms then next following, and to be prosecuted in the said court here to answer the said *James Filewood* in the plea aforesaid; and if it should happen that judgment should be given in the said court here for the said *J. F.* against the said *J. S.* in the aforesaid plea, that then the said *J. S.* should satisfy the said *James Filewood* the damages which should be adjudged to him in

vid: Dougl. 50.
Scire facias *Chandler*
against bail to *Robert*
a new original
to be sued out
in a cause re-
moved from
the Palace
court by an
habeas cor-
pus.

PART II.

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the

the court aforesaid in the said plea, or render his body to the King's prison of the *Fleet* on that occasion, which said recognisance taken and acknowledged before the said Justice in form aforesaid, he the said Justice afterwards on the 28th day of *November* in the 29th year of the reign of the said Lord the now King delivered into the said court here to be recorded, and the same was recorded in the said court accordingly, as by the record thereof in the said court here remaining more fully appears, which said recognisance still remains in the said court here in full force, no way satisfied, set aside, cancelled or made void: and although the said *J. F.* before the end of the said two terms did sue and prosecute a certain original writ in a plea of trespass on the case to the said *J. F.* his damage of 16*l.* out of the court of the said Lord the King of his Chancery at *Westminster* against the said *J. S.* by the name of *J. S.* late of the parish of Saint *James Westminster* in the county of *Middlesex* victualler, returnable before the King's Justices here, to which the said *J. S.* by his attorney appeared in the said court here by his sufficient attorney; and although afterwards, to wit, in *Michaelmas* term in the 29th year of the reign of the said Lord the now King, judgment in the said plea of trespass on the case was given in the said court here for the said *J. F.* against the said *J. S.* in the aforesaid plea, and the said *J. F.* then and there, by the consideration and judgment of the said court here, recovered against the said *J. S.* in the said plea 25*l.* 10*s.* which were then and there in the said court here adjudged to the said *J. F.* in the said court for his damages which he the said *J. F.* had sustained on occasion of the not performing of certain promises and undertakings then lately made by the said *J. S.* to the said *J. F.* at *W.* aforesaid in the said county of *M.* † whereof the said *J. S.* was convicted, as by the record and proceedings thereof remaining in the said court here in full force not reversed, annulled, paid off or satisfied, more fully and at large appears; yet the said *J. S.* hath not paid the said damages so recovered against him in form aforesaid, or any part thereof, nor rendered his body to the said prison of the *Fleet* on that occasion, as the said Lord the King hath received information from the said *J. F.* and because the Lord the King was willing that those things which were right done and acknowledged in the said court here should be carried into due execution, he commanded the said sheriff of *M.* that by good and lawful men of his bailiwick he should give notice to the said *T. P.* and *R. T.* that they might be here from the day of *Easter* in three weeks, to shew if they had or knew of any thing to say for themselves, to wit, the said *T. P.* why the said 12*l.* by him in form aforesaid acknowledged should not be made of his lands and chattels, and the said *R. T.* why the said 12*l.* by him in form aforesaid acknowledged should not be made of his lands and chattels, and levied to the use of the said *J. F.* according to the form and effect of the aforesaid recognisance, if,

† "As for his costs and charges about his suit in that behalf laid out and expended" (These words are omitted) but no notice taken thereof in the argument of the case.

&c. And now here at this day, to wit, from the day of *Easter* in three weeks the said *J. F.* cometh by *William Pryor Johnson* his attorney, and offereth himself on the fourth day against the said *T. P.* and *R. T.* in the plea aforesaid; and they being solemnly called to not come, neither doth either of them come; and the sheriff, do wit, *William Beckford*, Esq; and *Ive Whitbread*, Esq; now sheriff of *M.* aforesaid returneth that the said *T. P.* and *R. T.* have not, nor hath either of them any thing in his bailiwick where or by which he can give them or either of them notice, nor are the said *T. P.* and *R. T.* nor is either of them found in the same; therefore as before the sheriff is commanded, that by good, &c. he should give notice to the said *T. P.* and *R. T.* that they be here on the morrow of the Ascension of our Lord, to shew in form aforesaid, &c. if, &c. At which day the said *J. F.* cometh here by his attorney aforesaid, and offereth himself on the fourth day against the said *T. P.* and *R. T.* in the plea aforesaid; and they being solemnly called by *William Kinsley* their attorney come, and thereupon the said *J. F.* prays execution against the said *T. P.* and *R. T.* to wit, against the said *T. P.* of the said 12*l.* by him in form aforesaid acknowledged, and against the said *R. T.* of the said 12*l.* by him in form aforesaid acknowledged, according to the form and effect of the recognisance aforesaid to be adjudged to him, &c.

Second scire
facias

And the said *T. P.* and *R. T.* by the said *William Kinsley* their attorney come and pray leave to imparl here until on the morrow of the Holy Trinity, and they have it, &c. The same day is given to the said *J. F.* here, &c. at which day come here as well the said *J. F.* as the said *T. P.* and *R. T.* by their attorneys aforesaid; and the said *T. P.* says, that the said *J. F.* ought not to have execution against him of the said 12*l.* in form aforesaid acknowledged by virtue of the said recognisance, because he says, that the said *John Smith* in the said judgment mentioned before the issuing of the said first writ of *scire facias*, and before the return of any writ of *capias ad satisfaciendum* against him died, that is to say, at *W.* aforesaid; and this he is ready to verify; wherefore he prays judgment if the said *J. F.* ought to have execution against him for the aforesaid 12*l.* by him aforesaid acknowledged, by virtue of the said recognisance; and the said *R. T.* says that the said *J. F.* ought not to have execution against him of the aforesaid 12*l.* by him in form aforesaid acknowledged by virtue of the said recognisance, because he says, that the said *John Smith* in the said judgment mentioned before the issuing of the said first writ of *scire facias*, and before the return of any writ of *capias ad satisfaciendum* against him died, that is to say, at *W.* aforesaid; and this he is ready to verify; wherefore he prays judgment if the said *J. F.* ought to have execution against him for the aforesaid 12*l.* by him aforesaid acknowledged by virtue of the said recognisance.

Plea that the
defendant in
the original
action died
before any ca.
sa. returned
against him.

vide 2. East
313 as to proof
on this

W. Hayward.

And

Replication
shews a ca.
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original de-
fendant re-
turned in his
life time.

And the said *J. F.* thereupon prayeth leave to reply to the said pleas of the said *T. P.* and *R. T.* by them above pleaded here until on the morrow of All Souls, and he hath it, &c. the same day is given to the said *T. P.* and *R. T.* here, &c. at which day come here as well the said *J. F.* as the said *T. P.* and *R. T.* by their attornies aforesaid; and the said *J. F.* says, that he by any thing by the said *T.* above in pleading alledged ought not to be barred from having execution against him of the said 12*l.* by virtue of the said recognisance, because he says, that after the recovery of the aforesaid judgment against the said *J. S.* at the suit of the said *J. F.* and long before the suing forth the said writ of *scire facias* first above mentioned, to wit, on the 23d day of *January* in the 29th year of the reign of our said Lord the now King, he the said *J. F.* sued and prosecuted out of the court of our Lord the now King of the Bench here at *Westminster* in the county of *Middlesex*, of and upon the said judgment, his Majesty's writ of *capias ad satisfaciendum*, directed to the then sheriff of *M.* by which said writ our said Lord the now King commanded the then said sheriff that the said sheriff should take the said *J. Smith*, if he should be found in his bailiwick, and safely keep him, so that he might have his body before his Majesty's justices of the Bench here in eight days of the Purification of the blessed *Mary*, to satisfy the said *J. F.* his damages aforesaid in form aforesaid recovered; at which day *William Beckford*, Esq; and *Ive Whitebread*, Esq; then sheriff of *Middlesex* aforesaid, returned here upon the said writ, that the said *John Smith* was not found in his bailiwick, as by the said writ, and the said return thereof duly affiled in this court here on the file of writs of *capias ad satisfaciendum* of the term of *St. Hilary* in the 29th year aforesaid, may more fully and at large appear: and the said *J. F.* further says that the said *J. S.* at the said return of the said writ of *capias ad satisfaciendum*, and long afterwards, was living and in full life, to wit, at *Westminster* aforesaid; and this he is ready to verify; wherefore he prays judgment, and that execution of the said 12*l.* against the said *Thomas* by virtue of the said recognisance may be awarded to him, &c. And the said *J. F.* says that he by any thing by the said *R.* above in pleading alledged ought not to be barred from having execution against him of the said 12*l.* by virtue of the said recognisance, (and so replies exactly in the same manner to the plea of the defendant *R.*)

D. Poole.

Demurrer.

And the said *T. P.* as to the said plea of the said *J. F.* above in reply pleaded to the said plea of the said *Thomas P.* by him above pleaded says, that that plea in manner and form aforesaid above pleaded, and the matter therein contained, are not sufficient in law for the said *J. F.* to maintain his having execution against him the said *T. P.* of the aforesaid 12*l.* by virtue of the said recognisance, to which said plea in manner and form aforesaid above in reply pleaded,

pleaded, he the said *T. P.* need not, nor is he bound in any wise by the law of the land to answer; and this he is ready to verify; wherefore for want of a sufficient replication in this behalf, the said *T. P.* as before prays judgment, and that the said *J. F.* may be barred from having his execution against him for the aforesaid 12*l.* by him aforesaid acknowledged by virtue of the recognisance aforesaid; and the said *T. P.* for causes of demurrer in law in this behalf, according to the form of the statute in such case lately made and provided, shews to the court here these causes following, to wit, that the said replication is no answer to the matter in the said plea of the said *T. P.* above pleaded, and that the same is double, uncertain and insufficient in law, and tends to put in issue matter altogether that is not issuable, and the said *R. Turner* (the other bail) put in the like demurrer to the replication to his plea.

And thereupon the said *J. F.* prays leave to join in demurrer to the above demurrers of the said *T. P.* and *R. T.* here until in eight days of *St. Hilary*, and he hath it, &c. The same day is given to the said *T. P.* and *R. T.* here, &c. at which day come here as well the said *J. F.* as the said *T. P.* and *R. T.* by their attornies aforesaid; and the said *J.* says, that the said plea of the said *J.* above in reply pleaded to the said plea of the said *T. P.* by him above pleaded in bar, and the matter therein contained, are sufficient in law for the said *James* to maintain his having execution against the said *T. P.* for the aforesaid 12*l.* by him in form aforesaid acknowledged by virtue of the said recognisance, which said plea so pleaded in reply, and the matter therein contained, he the said *James* is ready to verify and prove, as the court here shall direct; and because the said *Thomas* hath not answered the said replication, nor hath hitherto in any wise denied the same, he the said *James* as before prays judgment and his execution against the said *T. P.* for the said 12*l.* by him in form aforesaid acknowledged by virtue of the said recognisance &c. and the said *James* also puts in the like joinder in demurrer to the demurrer of the other bail *R. Turner*: and because the justices here will advise themselves of and upon the premises before they give their judgment thereon, a day is given to the said parties here until from the day of *Easter* in fifteen days, to hear their judgment, for that the said justices here are not yet advised thereof &c.

Filewood *versus* Popplewell and Turner. C. B.

SCIRE facias upon a recognisance against bail, setting forth the same, and that *Filewood* recovered judgment against *Smith* the principal defendant, which still remains in full force *prout patet per recordum*; yet *Smith* hath not paid the damages recovered by the plaintiff

Engl: 30 Chancery
Return

Scire facias
upon a recognisance against bail.
7/11/6809

plaintiff against him, nor rendered his body to the prison of the *Fleet*, therefore the sheriff was commanded to give notice to the now defendants *Poplewell* and *Turner*, the said *Smith's* bail, that they be here on such a day to shew cause why the plaintiff should not have execution against them according to their said recognisance.

Defendants plead that the principal died before the issuing the first *sci. fa.* and before the return of any *ca. sa.*

Poplewell and *Turner* plead severally that the plaintiff ought not to have execution against them, because they say that *John Smith* in the said judgment mentioned, before the issuing of the said first writ of *scire facia*, and before the return of any *capias ad satisfaciendum* against him died; and this he is ready to verify; &c.

Plaintiff replies and sets out a *ca. sa.* and return, and that the principal was then living and long afterward.

The plaintiff replies that he ought not to be barred from having execution against the defendants, because he says, that after the recovery of the said judgment against *John Smith*, and before the suing forth the said first *scire facias*, viz. the 23d of *January* in the 29th year of the present King, he sued out a *capias ad satisfaciendum* (and sets it out), whereupon the sheriff returned a *non est inventus*, as appears by the writ on the file; and plaintiff further says, that at the time of the return of the said *ca. sa.* and long afterward, the said *John Smith* was living, to wit, at *W.* in the county of *M.* and this he is ready to verify; wherefore he prays judgment and execution to be awarded against the said bail.

Demurrer.

To this replication the defendants have demurred and the plaintiff hath joined in demurrer.

This case was argued this present term by serjeant *Hayward* for defendant, and serjeant *Poole* for the plaintiff.

It was objected that the replication is bad, because it is an affirmative upon an affirmative, and that it concludes with an averment without denying or traversing the death of *John Smith*, as alledged in the defendant's plea; and to prevent prolixity in pleadings the defendant ought to have denied the death of *Smith*, and to have concluded to the country, or with a traverse.

A rule in pleading when new matter is introduced.

It was answered for the plaintiff and resolved by the court, (*absente Noel Justice*) that the replication is very right, in concluding with an averment; and it would undoubtedly have been bad, if, after setting forth a *ca. sa.* it had concluded to the country by denying the death of *Smith*, or had traversed his death; for if the plaintiff had replied in that manner, the defendant would have been deprived of the right he had to rejoin that there was no such writ of *ca. sa.* which he might and had a right so to rejoin if he had thought fit; and it is an established rule in pleading, that where either party introduces new matter, the other side shall have an opportunity of answering to that new matter; and here the plaintiff by

by setting forth the *ca. fa.* in his replication has introduced *that* as new matter, and if he had concluded to the country, or with a traverse of the death of *Smith*, the defendants would have been deprived of an opportunity of answering to the *ca. fa.* and in that case thereplication would have been bad; and *Cartb. 4c.* was allowed to be in point; so judgment was given for the plaintiff upon the first argument.

N. B. In the argument of the above case it was agreed both by the Bench and the Serjeants at the bar, that if the principal defendant dies after the return of the *capias ad satisfaciendum*, although his death be before the suing forth the first *scire facias*, the bail are fixed with the debt and costs in point of law, and the *scire facias*'s are only an indulgence of the court; and so it was lately ruled in this court.

Young *versus* Moore. C. B.

IN order to hold the defendant to special bail the plaintiff makes affidavit that the defendant *is justly indebted to him* in the sum of 47*l.* for so much money won of him by the plaintiff at divers plays or games called *bragg*, and tols up, which sum of money the defendant hath several times promised to pay to the plaintiff.

Defendant at 3 *made* 434
retted for 10 *made* 723
money won
at play dis-
charged on
entering a
common ap-
pearance.

The defendant being arrested and in custody of the sheriff, it was moved by serjeant *Wynne* that he might be discharged upon entering a common appearance, this appearing to be above the sum of 10*l.* money won at play, at one time, as is sworn by the defendant. Upon shewing cause by serjeants *Martin* and *Davy* for the plaintiff, it was insisted that the defendant's affidavit ought not to be received in this case, and that as the plaintiff had sworn that the defendant was *justly indebted* to him in 47*l.* the court would presume that the money was won at several times, and less than 10*l.* at each time, and therefore a lawful debt. 2*dly.* That although the *stat. 9 Ann. c. 14.* has made all writings and securities for money won at play void, yet they insisted that it had not made parol contracts for money won at play void; and cited 2 *Strange* 1249. To this it was answered and resolved by the court, (the *Ld. C. Justice* and *Noel Justice* being absent) That the defendant's affidavit in this case ought not totally to be rejected, for it doth not deny the plaintiff's affidavit, but only swears that the money was all won at one time; and the plaintiff does not swear it was won at several times, and as the statute hath made all securities for money won at play void, *a fortiori* all parol contracts of this sort are void; and if the money had been paid to the plaintiff, the defendant, or any other person, might have recovered treble the sum and costs, so that

This action is
by *Wynne v. Loner*
Sp. Bail is required
when it is by *Loner*
ag. *Wynne*. *St. 1079*

this cannot possibly be a debt: besides, bail is a matter in the discretion of the court; the case in 2 *Stra.* 1249, was for money lent which is different from the present case. Defendant was discharged upon a common appearance.

Fitzpatrick *versus* Pickering C. B.

Middlesex.
Verdict for
less than 40s.
the defendant
has leave to
suggest that
he resided in
Middlesex.

THIS was an action upon the case for the use and occupation of the plaintiff's house, for above the sum of forty shillings, and upon several other counts; upon *non assumpsit*, the plaintiff at the trial, by reason of the absence of a witness, failed in proving the use and occupation, but got a verdict for twenty-eight shillings upon another count; and now it was moved on the behalf of the defendant for leave to enter upon the Roll by way of suggestion that the defendant was resident in the county of *Middlesex*, in order to have the benefit of the late statute touching the jurisdiction of the county court; and 1 *Stra.* 46 2 *Stra.* 974, 1120. were cited, and an affidavit of defendant's residency in *Middlesex* was read.

2 Barnes 283.

For the plaintiff it was said, that this is a very hard case, and therefore it is in the discretion of the court whether they will give leave to enter the suggestion prayed on the defendant's behalf; and if they do, the plaintiff will be in a worse case than if he had suffered a nonsuit, for then he might have brought another action, when he could have had his witness to prove the use and occupation. And in the case of mutual debts and a set-off, the plaintiff shall have judgment, although upon the trial he recovers less than 40s.

Ante Trin.
16 & 17 Geo.
2 B. R.

Per curiam: We are bound by the act of parliament to give the defendant leave to enter the suggestion prayed, and the plaintiff may traverse it if he pleases; and it is not in our discretion whether we will grant this or not; and the case of a set-off differs widely from this case, for there it is wholly in the defendant's power and knowledge whether he will insist upon and prove his set-off at the trial or not; and the case of *Pitt versus Carpenter* in *B. R.* was rightly determined. But here by the verdict we must take it that there was no more money originally due to the plaintiff than twenty-eight shillings; and therefore the *posse* must be delivered to the defendant, with leave to enter the suggestion prayed.

Serjeant *Martyn* for the defendant, Serjeant *Davy* for the plaintiff.

Norden

Norden *versus* Horsley. C. B.

THIS is an action of debt for 24 *l.* 18 *s.* upon a Palace court bail-bond. The defendant pleads the statute 12 *Geo.* 1. *c.* 29. for preventing frivolous and vexatious arrests, whereby (amongst other things) it is enacted, That in all cases, in order to hold the defendant to special bail, the plaintiff shall make affidavit of his cause of action, and that the sum specified in such affidavit shall be indorsed on the back of the writ or process, for which sum so indorsed the sheriff or other officer to whom such writ or process shall be directed shall take bail, *and for no more*; that the cause of action or sum sworn to be due to the plaintiff in this case is 12 *l.* and no more; and that the Palace court officer to whom the process was directed took the bail-bond in this case for 24 *l.* 18 *s.* which is more than double the sum sworn to by the plaintiff's affidavit. To this plea the plaintiff demurred, and the defendant joined in demurrer.

A bail bond taken in more than double the sum sworn to by the plaintiff, is good.

It was now objected by the counsel for the defendant that the bail-bond was void, being taken for more than double the sum sworn to be due to the plaintiff, and contrary to the statute.

But it was answered by the plaintiff's counsel, and resolved by the court, that the bond in the present case is a very good bond, for it doth not appear but the defendant gave and executed it freely and voluntarily, and that it is neither unreasonable by the statute of 23 *H.* 6. *c.* 10. nor made void by the statute of 12 *Geo.* 1. now pleaded; and it has always been the practice to take bail-bonds for more than the sum sworn to, *viz.* in double the sum, and if the bond in this case were void, it would be void in every case where it was taken in double the sum. Indeed it might have another consideration with respect to the sheriff or officer, how far such officer would be punishable by action or otherwise, if he should refuse to set a defendant at large, unless he would give very unreasonable security for his appearance and putting in bail above. But in the present case the bond is not unreasonable, being taken only for 18 shillings more than double the sum sworn to, and which seems to be only a mere mistake, and not with any design to oppress the defendant. Judgment for the plaintiff.

Cooke's Cases of Practice, Hil. 1 *Geo.* 2. 43.

Trinity Term

30 & 31 Geo. 2. 1757.

Buxton *versus* Mingay. C. B.

Game.
Question on
the stat 4 &
5 W. & M.
c. 23. sec. 10.
who is or is
not an inferior
tradesman.

*whether re. Plf be an
inferior tradesman
or no Plf is in the
under this Court to
recover a verdict
as at law; law, but
will have no more
costs 4th Baines.
Dallant & Anell.
2. Black. 900.*

TRESPASS *quare clausum fregit*; the plaintiff declares that the defendant being an inferior tradesman, to wit, an apothecary, such a day committed the trespass by hunting in the plaintiff's close; upon the general issue Not guilty, this cause was tried at *Thetford, March, 13, 1752.* before Mr. Justice *Denison*, when a verdict was found for the plaintiff, and 1s. damages and 40s. costs, subject to the opinion of this court, upon a case made, which states, that it was proved at the trial, that the defendant at the time of the trespass was a surgeon and an apothecary, and not qualified to hunt or kill game within the intent of the statutes; that on the 27th of *December 1751.* he was hunting with divers others not qualified, in company with a person who was properly qualified to kill game, and committed a trespass in the plaintiff's close.

The Question for the consideration of the court is, whether upon the facts above stated the defendant shall be deemed an inferior tradesman within the intent and meaning of the statute 4 & 5 W. & M. c. 23. sec. 10. which runs thus: " And whereas great mischiefs
" do ensue by inferior tradesmen, apprentices, and other dissolute
" persons neglecting their trades and employments, who follow
" hunting, fishing, and other game, to the ruin of themselves and
" damage of their neighbours; for remedy whereof be it enacted
" by the authority aforesaid, that if any such person as aforesaid
" shall presume to hunt, hawk, fish or fowl, (unless in company
" with the master of such apprentice duly qualified by law)
" such person or persons shall be subject to the penalties of this act,
" and shall or may be sued and prosecuted for their wilful trespass
" in such their coming on any person's land, and if found guilty
" thereof, the plaintiff shall not only recover his damages thereby
" sustained, but his full costs of suit; any former law to the con-
" trary notwithstanding. So that if the defendant be a person
" within

“ within the meaning of this clause of the statute, the plaintiff
 “ shall have his full costs, otherwise no more costs than damages.

This case was three or four times argued at the bar; and in this term by *Hewit* serjeant for the plaintiff, and *Poole*, one of the King's serjeants, for the defendant. It was said for the plaintiff, that there is no such distinction as superiority or inferiority between trades or tradesmen, either in legal or common apprehension; and that therefore the legislature could never mean to consider one trade as superior to another, or to make any distinction in trades, but that by the words inferior tradesmen, they meant every person in trade not qualified by law; and that this was a reasonable construction & *secundum subjectam materiam*, that statute being made for preservation of the game.

For the defendant it was insisted, that to intitle one to go a hunting, there is no qualification necessary, and therefore a qualification is not the criterion to determine or try who is, or is not an inferior tradesman within the true meaning of this statute, but that every case of this kind ought to be left to a jury, who might, with certainty sufficient, determine under the particular circumstances of the case, what person is, or is not an inferior tradesman, otherwise the lord mayor, or richest tradesman in *London*, could not lawfully go a hunting without a qualification in lands, which could never be the meaning of the legislature.

2 Str. 1126.
 Comyns 576.
 1. 2. 149

The court being equally divided in opinion, delivered the same *seriatim* the last day of this term, the puisne judge beginning first.

Noel justice for the defendant. I think it would be hard for me to say that every tradesman in this kingdom (though never so rich in money) who hath not a qualification in lands, shall pay full costs in a case like this; nor can I prevail upon myself to say that the defendant, because he is merely stated to be an apothecary, is therefore an inferior tradesman, or a dissolute person.

It was argued for the plaintiff, that amongst tradesmen, *as such*, there can be no line drawn with respect to who are superior, and who are inferior, but that they are all upon an equal footing as tradesmen, and that therefore the legislature by the words inferior tradesmen, meant such as were not qualified; but I think if this construction was to prevail, it would bring every gentleman (tho' of the best of families in *England*) as well as rich tradesmen who have not a qualification, within the meaning of this clause.

It was argued for the defendant at the bar, that a qualification was not necessary to authorize a person to go a hunting; I shall say

say nothing to that point, but however that may be, I think a person going out with a gentleman qualified to kill game, cannot be convicted for killing game as an unqualified person.

It is said for the plaintiff that if the qualification be not the true distinction, no line can be drawn between *superior*, and *inferior*; but I answer, there is a known distinction universally agreed to be between tradesmen with respect to superior and inferior, as master, and journeymen and apprentice; and this is a natural subordination which answers the act of parliament in every respect, for journeymen and apprentices are plainly inferior, and within the mischief intended to be remedied: I do agree that the statute says, "*unless in company with a master qualified*," and that every apprentice being out a hunting not in company with a master qualified is within the statute.

I think the jury at the trial ought to determine, under the particular circumstances of every case of this kind, whether the defendant be, or be not an inferior tradesman, or dissolute person; and it is too much for me to say that this defendant, who is an apothecary and surgeon, is an inferior tradesman, or a dissolute person. In my own private opinion a surgeon is the fittest person in the world to be in the field with gentlemen a hunting, for I remember the master of a pack of hounds had his neck dislocated by a fall from his horse when out a hunting, and if a surgeon had not been near him when the accident happened, who pulled his neck right, the gentleman would most certainly have lost his life.

It generally happens that near every great town in *England* some gentleman keeps a pack of dogs, and it is well known that he never goes out without being accompanied by many tradesmen as well as others not qualified; if therefore judgment in this case was to be for the plaintiff to have his full costs, it would lay a foundation for an infinite number of suits.

Upon the whole, I am of opinion the defendant cannot be said to be an inferior tradesman, nor a dissolute person, and that the plaintiff ought to have no more costs than damages.

Batbursf Justice for the plaintiff. I think this a question of law and not of fact, and that the Judges, and not the jury are to determine who are inferior tradesmen, or dissolute persons, within this law. In order to find out the true construction of this statute, we must take the intent of the makers into consideration, which was plainly to secure the game from being destroyed by persons neglecting their lawful employments, as appears by the preamble. There may be an inferior and superior between master and journeymen
and

and apprentice, but I can never be of opinion that the legislature intended to permit every master of every little mechanic trade to neglect his trade and go a hunting; the clause under consideration (it must be admitted) is a little obscure, but I am of opinion that every tradesman is inferior who is not qualified, and that is the only line we can possibly draw between inferior and superior. And I am inclined to think the parliament purposely penned the act in this obscure manner not to disoblige their constituents, many of whom are tradesmen. In *Bennet and Talbois, Comyns 26.* it was objected that a clothier was not an inferior tradesman; *sed non allocatur* (says the book) for the statute seems to prohibit all trades.

Upon the whole, I am of opinion that all qualified tradesmen are not inferior tradesmen, and that all unqualified tradesmen are inferior.

Clive Justice for the plaintiff. I intirely agree in opinion with my brother *Bathurst*. (*Nota*; he delivered his opinion to the same effect.)

Wilkes Lord Ch. Justice for the defendant. I think myself unfortunate whenever I differ in opinion with any of my brethren; however, I have the pleasure to reflect that in the 20 years I have sat here; this is but the third time I have differed with any of my associates.

The single question here, is, who is that tradesman shall pay full costs in a twelvepenny trespass, in hunting in company with a gentleman qualified.

I do not think it necessary to draw any line at all in this case, but it ought to be considered upon its own circumstances; and I am clear of opinion the legislature could never intend that a surgeon is an inferior tradesman within this clause; I think the case consists both of matter of law and matter of fact, and if I had been to try this cause, I should have told the jury my opinion, upon hearing the evidence and the circumstances of the defendant, and have ask'd them, whether upon their oaths they could say that this defendant was an inferior tradesman, a dissolute person, or neglected his trade; and in this manner I should have spoke to them, and then left them to say what was their verdict upon the whole evidence and circumstances of the person and case of the defendant. For my own part I cannot upon my oath say that this defendant, merely as an apothecary and surgeon, is an inferior tradesman, or a dissolute person, and agree intirely with my brother *Noel*, that the plaintiff ought to have no more costs than damages; therefore as the court is equally divided there can be no rule, but let the *posse* remain in court.

PART. II.

U

French

French an attorney *versus* Watfon. C. B.

Whether the defendant has been always ready to pay. **C**ASE, six several counts upon *assumpsit*; as to the second, fourth, fifth and sixth counts, the defendant pleads *non assumpsit* generally, and issue thereon is joined; and as to the first and third counts, which are each for 20 *l.* he pleads that as to all except 6 *l.* in one, and 4 *l.* 10 *s.* in the other *non assumpsit*, and that he owes the plaintiff no more than 10 guineas, and says *he is ready and has always been ready to pay the same*, and brings it into court if the plaintiff will accept thereof; and prays judgment if the plaintiff ought to have his action for more than 10 guineas. General demurrer; defendant joins in demurrer, and prays plaintiff may be barred from having his action.

It was objected for the plaintiff that this plea is bad, for here is no tender pleaded; and whether the defendant has been always ready to pay, is not issuable, and every plea ought to contain issuable matter; and of that opinion was the court *absente Cap' Justice*. And they said the joinder in demurrer was also bad, (but gave no reason why it was so.) Judgment for the plaintiff.

Simpson *versus* Neale, Esq; C. B.

Pleading. The plea of *nul tiel record* must have a serjeant's hand. **C**ASE on several promises in *assumpsit*; the defendant pleads a recovery in *B. R.* for the same demands; plaintiff replies *nul tiel record* without a serjeant's hand; rule to shew cause why the replication should not be set aside for want of a serjeant's hand to it; on shewing cause it was insisted by *Prime* and *Davy* serjeants for the plaintiff, that the rule ought to be discharged; and cited *Reports and Cases of Practice* in folio, published in 1742. page 41. *Upton versus Pullyn*, where amongst other pleas it is reported by Sir *Geo. Cooke*, that the plea of *nul tiel record* needs not a serjeant's hand. In answer to which it was answered by the serjeant for the defendant, that all pleas whatever, except the general issue ought to be signed by a serjeant, and that it appears by the year-books for ages successively, that this plea of *nul tiel record* was always pleaded by a serjeant at the bar; and cited 19 *H.* 6: 79. *b.* 80. *a.* and many other cases from the year-books; and said that the case cited out of *Cooke's* book is not agreeable to the rule pronounced by the court in *Upton* and *Pullyn*; but the catalogue of pleas inserted by Sir *Geo. Cooke* there seems to be intended to draw practicers into the Common Pleas. See the affidavit and rule in *Mr Foley's*, the second prothonotary's office. But what was chiefly insisted upon was, that, as the plea of a recovery in *B. R.* in this case was pleaded and signed

signed by a serjeant, the same ought to be replied to, or answered by a serjeant *propter dignitatem*, for that no attorney or apprentice can answer a serjeant, or plead any plea in the court of Common Pleas; and of that opinion was the court, viz. Clive, Bathurst and Noel Justices; *absente* C. Just. who was in the court of Chancery this day June 15, 1757. And the rule was made absolute for setting aside the replication of *nul tiel record* for want of a serjeant's hand.

*overruled. 2. Black.
516*

Roe on the demise of Wilkinson *versus* Tranmer & al'.

Ejectment for lands in Yorkshire. C. B.

*5B16923. King 225
513 & 107-7 B16243*

UPON the trial of this cause it appeared in evidence, that Thomas Kirby being seised in fee of the lands in question made and executed certain deeds of lease and release. The lease dated November 9, 1733. made between the said Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, whereby it is witnessed that the said Thomas Kirby, in consideration of 5s. did grant, bargain and sell to the said Chr. Kirby his executors, administrators and assigns, the lands in question; to have and to hold the same unto the said Chr. Kirby, his executors, administrators and assigns, from the day before the date thereof for the term of one year under a pepper corn rent, to the intent that by virtue of these presents, and by force of the statute for transferring uses into possession, he the said Christopher may be in the actual possession of all the premises, and be enabled to take and accept of a grant and release of the reversion and inheritance thereof to them and their heirs, to, for and upon such uses, intents and purposes, as in and by the said grant and release shall be directed or declared. In witness, &c. executed by Thomas Kirby.

What deed of conveyance shall or shall not operate as a covenant to stand seised to uses.

*Miller Rip. 682
2 new 503*

The release dated November 10, 1733. made between Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, witnesseth that for the natural love he beareth towards his said brother, and for and in consideration of 100 l. to the said Thomas Kirby paid by the said Chr. Kirby, he the said Thomas Kirby hath granted, released and confirmed, and by these presents doth grant, release and confirm unto the said Chr. Kirby, in his actual possession thereof now being, by virtue of a bargain and sale for one whole year to him thereof made by the said Thomas Kirby, by indenture dated the day next before the day of the date hereof, and by force of the statute made for transferring of uses into possession, after the death of the said Thomas Kirby, all that one close, &c. (the premises without any words of limitation to the releasee;) To have and

to hold the said premises unto the said *Chr. Kirby* and the heirs of his body lawfully begotten, and after their decease to *John Wilkinson*, eldest son of my well-beloved uncle *John Wilkinson* of *North Dalton* in the county of *York*, gentleman, to him and his heirs and assigns, and to the only proper use and behoof of him the said *John Wilkinson* the younger, his executors, administrators or assigns for ever, he the said *John Wilkinson* the younger paying or causing to be paid to the child or children of my well-beloved brother *Stephen Kirby* the sum of 200 *l.* and for want of such child or children, then to the child or children of my well-beloved sister *Jane Kirby*, and for want of such issue, then to the younger children of my well-beloved uncle *John Wilkinson* of *North Dalton* aforesaid, and for want of such younger children, then the said estate abovementioned to be free from the payment of the abovenamed sum of 200 *l.* Then the releasor covenants that he is lawfully seised in fee, and that he hath good right and full power to convey the premises to the said *Chr. Kirby*, and also that it may and shall be lawful to and for the said *Chr. Kirby*, or the said *John Wilkinson* the younger, from and after the death of him the said *Thomas Kirby*, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said messuage, lands and premises, with the appurtenances, not only without the lawful let, suit, &c. of him the said *Thomas*, but all others claiming under him, &c. free from all incumbrances. Then it is covenanted by all the parties, that all fines and recoveries and deeds of the premises levied, suffered or executed by the parties or any of them, or by any other persons, shall be and enure to the use of the said *Chr. Kirby* and his heirs of his body lawfully begotten, and for want of such issue, then to the use of the said *John Wilkinson junior*, his heirs and assigns for ever according to the true intent of these presents. In witness, &c. Executed by *Thomas Kirby*.

It further appeared in evidence, that *Chr. Kirby* on the 10th of *November* 1733. paid to the said *Thomas Kirby*, 20 *l.* in money, and gave him his note for 80 *l.* payable to the said *Thomas Kirby*, who signed a receipt on the backside of the said deed of release in these words, viz. Received the day and year within written of the within named *Chr. Kirby*, the sum of one hundred pounds, being the full consideration-money within mentioned to be paid to me. I say received by me *Thomas Kirby*, Witness *M. J. S. T.*

It further appeared in evidence, that *Chr. Kirby* died without issue in 1740. and that *John Wilkinson* the lessor of the plaintiff is the same *John Wilkinson* named in the deed of release, but it did not appear that the said *John Wilkinson* had notice of the said deeds of lease and release until a short time before this ejectment was brought.

This

This being the case for the consideration of the court, the general question is, whether the lessor of the plaintiff has a title to recover upon the lease and release.

It has been argued at the bar three times, the first time by serjeant *Willes* for the lessor of the plaintiff, and serjeant *Poole* for the defendant, and the second and third times (because of a new judge) by serjeant *Hewit* for the plaintiff, and Sir *Samuel Prime*, the King's first serjeant, for the defendant.

It was admitted by the serjeants who argued for the plaintiff, that the lease and release being made to convey to *Cbr. Kirby*, an estate in fee-tail to commence *in futuro*, viz. after the death of the releasor, cannot operate as a common law conveyance, or as a lease and release; but they insisted that the release should take effect as a deed of covenant to stand seised to uses, *ut res magis valeat quam pereat*; and cited a variety of cases to prove it had every requisite necessary to constitute such a deed of covenant to stand seised to uses, that is to say, 1. Here is a sufficient and proper consideration; 2. A deed; 3. The covenantor was seised in fee; 4. Here are apt words, for the word *grant* of itself is sufficient in such a deed; and 5. Here is a manifest and plain intent.

On the other side it was insisted for the defendants, 1. That it plainly appears to be the intent of the parties that this conveyance should be by a lease and release, and therefore shall not operate as a covenant to stand seised to uses. *Co. Lit. 49 a.* And as the release is admitted on all hands to be void for the reason above, nothing passes thereby to *Wilkinson* the lessor of the plaintiff. 2. It was objected for the defendant that *Wilkinson* is not a party to the deed. 3. That there was not a proper consideration of blood to raise an use to him. 4. That no estate at all passed by this deed to *Christopher Kirby*, out of which the estate *in futuro* could arise or come to *Wilkinson* the plaintiff's lessor.

After time taken to consider, the court were all of opinion that the release was void as a common law conveyance, it being to convey a freehold to commence *in futuro*, but that it should have the effect and operation of a covenant to stand seised to uses; and in *Hilary term 31 Geo. 2.* Lord Chief Justice *Willes* gave the judgment of the whole court for the plaintiff.

Willes C. Justice. It is admitted and agreed on all hands that this deed is void as a release, because it is a grant of a freehold to commence *in futuro*; and therefore the only question is, whether it shall take effect as a covenant to stand seised to uses; and we are all of opinion that it shall (my brother *Barbours* not being here authorized me to say he is of the same opinion.)

The judgment of the court was given in *Hilary term 31 Geo. 2. 1758.*

PART II.

X

Many

Many cases have been cited on both sides, some of which are very inconsistent with one another, and to mention them all, would rather tend to puzzle and confound, than to illustrate the matter in question; and therefore I shall only take notice of those things we think most material, and of some few cases nearest in point for our judgment.

It appears from the cases upon this head, in general, that the judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds *ut res magis valeat quam pareat*. I rely much upon *Sheppard's Touchstone of common assurances* 82, 83. (which is a most excellent book) where he says, when the intent is apparent to pass the land one way or another, there it may be good either way.

By the word *intent*, is not meant the intent of the parties to pass the land by *this* or *that* particular kind of deed, or by any particular mode or form of conveyance, but an intent that the land shall pass at all events one way or other.

Lord Hobart (who was a very great man) in his *Reports* fo. 277. says, "I exceedingly commend the judges that are curious and almost subtil, *astuti*, to invent reason and means to make acts according to the just *intent* of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act; and my Lord Hale in the case of *Crossing* and *Scudamore*, 1 Vent. 141. cites and approves of this passage in Hobart.

Although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise, and certainly it is more considerable to make the *intent* good in passing the estate, if by any legal means it may be done, than by considering the *manner* of passing it, to disappoint the intent and principal thing, *which*, was to pass the land. *Osman* and *Sheafe* 571. Upon this ground we go.

We are all of opinion that in this case there is every thing necessary to make a good and effectual covenant to stand seised to uses. *First*, Here is a deed. *Secondly*, Here are apt words, the word *grant* alone would have been sufficient, but there are other words besides, which are material, *viz.* A covenant that the grantor has power to grant, and a covenant that all fines, recoveries, &c. of these lands shall enure to the uses in the deed. *Thirdly*, The covenantor was seised in fee. *Fourthly*, Here appears a most plain *intent* that *Wilkinson* the lessor of the plaintiff should have the lands in case *Chr. Kirby* died without issue. And *lastly*, Here is a proper consideration

consideration to raise an use to the lessor of the plaintiff, for the covenantor in the deed names him to be the eldest son of his well-beloved uncle; these are all the circumstances necessary to make a good deed of covenant to stand seised to uses.

In support of their opinion the Ch. Justice only cited and observed upon these cases, viz. *Crossing and Scudamore*, 1 Mod. 175. 2 Lev. 9. 1 Vent. 137. *Walker and Hall*, 2 Lev. 213. *Coultsman and Senhouse*, Tho. Jones 105. *Carth*. 38, 39. *Baker vers. Hil*. 2 W. & M. B. R. *Osman and Sheafe*, 3 Lev. 307.

The C. Justice lastly cited two of the strongest cases mentioned for the defendants, as *Hore and Dix*, 1 Sid. 25. *Samon and Jones*, 2 Vent. 318. and said he did not (for his own part) understand them, and that if he had sat in judgment in those cases, he should have been of a different opinion in both; however, he said the present case differed from these two cases. Lastly, he said the whole court were clear of opinion that a man seised, might covenant to stand seised to the use of another person after the covenantor's death. *Postea* delivered to the plaintiff.

Campbell Clerk versus Aldrich Clerk. C. B.

THIS is a rule to shew cause why a prohibition shall not issue to the consistory court of the bishop of London, grounded upon a suggestion that the defendant hath libelled the plaintiff in the spiritual court for marrying without banns or licence, and several instances are set forth, "as appears by the register book;" also that the plaintiff has baptized several children, and performed other ministerial offices in the parish of St. John without any licence from the bishop.

Prohibition to a suit in spiritual court for marrying without banns or licence.

Against the prohibition, it was said there was no plea put in below, so the libel is confessed to be true; and thereupon it was insisted that the matters therein contained were of spiritual jurisdiction, and so the rule ought to be discharged.

For the prohibition it was said that the spiritual court were taking cognisance of a matter proper at law; for now since the late marriage act it is felony to marry without banns or licence, and there must first be a trial at common law before a clerk in such case can be deprived or degraded; and so is *Hob*. 290.

The whole court were of opinion that the rule should be made absolute as to the marrying without banns or licence, that the plaintiff may declare, and this matter upon the late marriage act may be more solemnly debated; and as to the other ministerial acts in the libel the rule was discharged. Serjeant Prime for the plaintiff, serjeant Poole and serjeant Hewitt for the defendant.

Michaelmas Term

31 Geo. 2. 1757.

Roe of the demise of Kirby *versus* Holmes. C. B.

642253

EJECTMENT, of two messuages in *Yorkshire*; at the trial in 1756. this case was made for the opinion of the court.

What words
in a will cre-
ate an estate
for life.

William Hardisty being seised in fee according to the custom of the forest of *Knareborough* of the copyhold lands in question in *Memwith cum Darley*, surrendered the same to the use of his will, which he made in these words, *viz.* "Whereas I have surrendered, or intend to surrender, all my copyhold lands and tenements to the use of my last will, I do hereby give and devise the same to my daughter *Jane*, her heirs and assigns for ever; but in case my said daughter dies before she attain the age of 21 years and have no issue, then my will is that my nephew *John Hardisty* shall have my said copyhold lands and tenements:" Whereas my estate in *Birsiwith* is surrendered to me and my wife, our heirs and assigns for ever, my will is, that she surrender the same after her decease to my said daughter *Jane* and her heirs within six months after my decease. And whereas I believe my nephew *John Hardisty* is heir at law to my daughter in case she die without issue, my will therefore is, that he surrender the last premises to my nephews the sons of my brother *Crosby* in fee, or else to have no benefit of this my last will and testament; and I will that my said nephews, sons of my brother *Crosby*, have my lands in *Menwith with Holme and Darley*, their heirs and assigns, share and share alike.

Upon the 31st of *January* 1750, the testator died seised in fee leaving *Jane* his only child, who died afterwards on the 2d of *March* 1752. without issue and under twenty-one years of age. *John Hardisty*, the nephew of testator, survived *Jane*, and died the 25th of *June* 1753. without issue, was never admitted tenant, nor ever made any disposal of the lands in question.

John Hardisty, the father of *John Hardisty* the testator's nephew is heir at law to *Jane* and brother and heir at law to *William* the testator,

testator, and surrendered the lands in question to the use of the lessor of the plaintiff 15 August 1754. and also granted the same according to the custom of the forest, in fee.

The defendant's title is only possession.

This case was argued twice at the bar, and the single question in the case was, whether *John Hardy* the nephew, by the will, took an estate in fee or for life; if he took a fee, then the lessor of the plaintiff has no title; but if he took only a life estate, then the plaintiff's lessor has a good title under *John Hardy*, the brother and heir of the testator.

The whole court were clear of opinion for the plaintiff, that the nephew only took an estate for life; that the testator, by his devise to *Jane*, plainly understood the force of words of limitation, and if he had intended to give his nephew more than an estate for life, he knew how to have done it; that there were no express words in the will that gave the nephew a fee, nor any manifest intention to do so, or to disinherit the heir at law.

Judgment for the plaintiff.

Trinity Term

31 Geo. 2. 1758.

Knight, Esq; *versus* Lillo. C. B.

TRESPASS for breaking and entering the close of the plaintiff called *Stow-Hill*, and for treading down the grass there, and for eating other grass with cattle.

Trespass.
Judgment for the plaintiff because the whole trespass in the declaration is not covered by the defendant's justification.

The defendant pleaded three pleas: *First*, Not guilty to the whole declaration; *2dly*, A justification in bar, that the plaintiff ought not to have his action against him for entering the said close and treading down the grass there, because he says, that the close lies in the hundred of *Parflow* in the county of *Salop*, and that long before the time when, &c. *John Walcott*, Esq; was and still is seised

PART II.

Y

in

Prescription
for a liberty
and privilege
of entering
the close to
seek for and
kill game
there as ap-
purtenant to
hundred

in fee of the said hundred, with it appurtenances, and that the said *John Walcott*, and all those whose estate he now hath, and at the said time when, &c. had of and in the said hundred, with its appurtenances, time out of mind have been accustomed to have and use, and still of right ought to have and use the benefit, liberty and privilege of entering into the said close for the purposes of seeking, taking and killing game there within the said close in which, &c. and of seeking, taking and killing game there as belonging and appertaining to the said hundred; wherefore the said defendant as servant of the said *John Walcott*, and by his command, at the said several times when, &c. entred into the said close in which, &c. for the purposes of seeking, taking and killing game there, and then and there shot at and killed game there found for the said *John Walcott*, as it was lawful for him to do, and in so doing unavoidably and necessarily trod down, spoiled and consumed a little of the grass there, which is the same trespass, &c. and this he is ready to verify: the third plea is a like justification, only it does not say, "As belonging and appertaining to the said hundred;" the plaintiff joins issue upon the Not guilty, and traverses the two prescriptions severally, whereupon issues are likewise joined. At the trial there was a verdict for the plaintiff upon the general issue, and a verdict for the defendant upon the other two issues upon the prescriptions.

It was now moved by serjeant *Poole* that the plaintiff ought to have judgment upon the whole record as to all the issues joined, alledging that both the prescriptions were bad in point of law.

But the court said there was no occasion to debate whether the prescriptions were good or not, for that the plaintiff at all events must have judgment upon the general issue, because there is a trespass laid in the declaration, viz. *the eating grass with the defendant's cattle*, of which he is found guilty, and which is not covered or answered by the justifications. And unless the plaintiff would waive that part of the finding of the jury as to the general issue and eating the grass, the court refused to hear any argument touching the prescriptions. So the counsel being desirous to have the validity of the prescriptions determined, took time to know whether the plaintiff would waive his verdict upon the Not guilty; and if he would not then judgment was for the plaintiff.

Blayer versus Baldwin C. B.

An execution
cannot be
continued on
the Roll
which was
never returned
or filed.

WITHIN a year after final judgment given in this cause, a *fiery facias* was sued out in *Easter* term 1757. and returnable on the morrow of the ascension of our Lord in that term, and was continued upon the Roll down 'till this term by *vicecomes*

not

non misit breve; and the defendant being this term taken upon a *capias ad satisfaciendum* issued upon the judgment, it was moved by serjeant *Poole* that this is irregular, there neither being any *scire facias* to revive the judgment, it being above a year old, nor any execution returned by the sheriff to warrant the entry of the continuances on the Roll.

Per curiam: The defendant must be discharged out of custody, and the plaintiff must pay the costs of this application, for it is irregular to continue an execution on the Roll which was never returned or filed. Serjeants *Prime* and *Davy* for the plaintiff.

Michaelmas Term

32 Geo. 2. 1758.

Cutfield *versus* Coney and others. C. B.

AFTER the plaintiff in replevin had declared he died before the defendant made any avowry, so that the suit was abated by the act of God, after the declaration and before any avowry: whereupon it was moved on the behalf of the defendants (who were overseers of the poor, and had distrained as being so) that they might have a writ *de retorno habendo*. This being a nice question, the court ordered the cause to be put in the paper, and this point to be more solemnly debated.

Plaintiff in replevin dies after a declaration and before avowry, no return *habendo* can be issued.

After hearing counsel on both sides, the court took time to consider, and in this term gave judgment that there ought not to be any return of the goods; they said that many cases had been cited on both sides, but that they founded their determination upon Lord Ch. Baron *Gilbert's Law of Distresses and Replevins*, fo. 231, 232. and that it would be absurd to grant a *return habendo* where there is no avowry. By the declaration the defendant is charged with an unjust caption and detention, and he must purge himself thereof by

an avowry before he can be intitled to have a return, for a return is adjudged by the court on the justice of the original caption, and therefore the defendant must first shew the justice of this caption before he can have a return; and they said the party may distrain again. Serjeant *Hewit* for the plaintiff, serjeant *Prime* for the defendant.

Graves *versus* Wife. C. B.

Practice.
Notice of declaration must set forth the nature of the action.

THIS was a motion to set aside an interlocutory judgment for irregularity; the irregularity complained of was, that notice of a declaration was given to the defendant "that it was left in the office of Mr. Prothonotary *Jones* in an *action for work and labour done by the plaintiff for the defendant*" without specifying technically the nature of the action, for the words ought to have been *in an action of trespass upon the case*, and not being so, the judgment was set aside (the Chief Justice absent.)

N. B. This seems a very hard case, for the words, "In an action for work and labour," are more intelligible to the lay gents, than the words *trespass on the case*. However, the court said they must abide by their rules; and the rule in this case is, that *the nature of the action* must be specified in the notice. See the rule *anno 1 Geo. 2.* Serjeant *Hewitt* for the plaintiff, serjeant *Davy* for the defendant.

Hilary Term

32 Geo. 2. 1759.

Coke *versus* Sayer. In B. R.

THIS was an action against the defendant for criminal conversation with the plaintiff's wife. The defendant pleaded two pleas, Not guilty, and Not guilty within six years; issue to the country was joined upon the first plea and a demurrer was to the latter. There was a verdict for 20l. upon the issue tried by the country; and now the demurrer to the plea of the statute of limitations was argued, and that plea was held good. *Per totam curiam*, There must be judgment on the demurrer for the defendant, and the plaintiff must have no damages, nor must costs be paid on either side upon account of the trial.

Not guilty, and Not guilty within six years, to an action for crim' con'; issue to one and demurrer to the other; verdict for plaintiff on the issue; judgment for defendant on demurrer.

Bur. 749
502403

Vanderplank *versus* Banks. C. B.

THE defendant pleaded a variance between the writ and the declaration, without craving or setting forth *oyer* of the writ; the plaintiff demurred, and it was held that the defendant should answer over, agreeable to the case of *Bragg versus Digby*, 2 Salk. 658. which is in point.

Variance.

Easter Term

32 Geo. 2. 1759.

Preston *versus* Christmas. C. B.

Pleading.
Accord and
satisfaction
where to be
by deed.

DEBT upon a bond; defendant pleads accord and satisfaction, *viz.* That he released to the plaintiff all his equity of redemption of certain tenements in satisfaction of all bonds wherein the defendant was bound to the plaintiff; the plaintiff demurred, and the defendant joined in demurrer.

1 Rol. Abr.
121. p. 7. 8.

It was argued by serjeant *Poole* for the plaintiff, that this plea was bad in two respects; *1st*, That it is an accord without any legal satisfaction; that an equity of redemption was considered of no value at law; and so is *Lit. sec.* 332. where it is laid down, that if the mortgagor doth not pay the money at the day in the condition, the land which is put in pledge is taken from him for ever, and so is dead to him upon condition; so that, at law, an equity of redemption is of no value.

2dly, That this is an action of debt upon a deed, and being so, the accord and satisfaction ought to be by deed, and not being pleaded to be by deed, the plea for this reason also is bad; for wherever a certain debt is created by deed, it cannot be discharged but by matter of as high a nature, and not by an accord or matter *in pais*. 6 Rep. 43. *Blake's case*, and *Cro. Jac.* 254. And though perhaps where there appears to be a condition for payment of money, an accord may be pleaded in satisfaction of the money or condition, yet it cannot be pleaded in satisfaction of the deed or obligation; and for any thing that appears on this record, this is a bond without any condition at all.

Serjeant *Hewitt* insisted in answer to the first objection, that wherever an advantage accrued to the plaintiff, if he received and accepted of that advantage in satisfaction, it might be well pleaded, that a pot of wine had been deemed a good satisfaction of all actions. 1 Ro. Abr. 128. p. 9. That an equity of redemption was a beneficial thing, and it was not material what the value of it was.

In

In answer to the second objection, that the plea is bad because pleaded in satisfaction of a bond, he said he thought it was the same thing whether it was pleaded in satisfaction of the bond, or of the money or debt owing upon the bond; and that it would have been a good plea if it had been pleaded in satisfaction of the money, seems to be admitted by the cases cited on the other side.

The whole court were clearly of opinion with the plaintiff in both points; 1st. That a release of an equity of redemption was nothing at all in the eye of the law; and 2^{dly}, That this being a debt upon an obligation without any condition, satisfaction must be pleaded to be by deed; and that 6 Rep. 43. and Cro. Jac. 254. are directly in point.

Judgment for the plaintiff.

Jones *versus* Herne. C. B.

ACTION of slander for these words, viz. "You (meaning the plaintiff) are a rogue, and I (meaning the defendant) will prove you a rogue, for you forged my name." No special damage was laid in the declaration; there was a verdict for the plaintiff upon Not guilty; and it was now moved by serjeant Nares in arrest of judgment, that these words are not actionable; to prove which he cited 3 Leon. 231 pl. 313. where the words, "Thou hast forged my hand," were held not actionable. But *per totam curiam*, the saying a man is a forger, or has forged one's hand, is actionable; and they over-ruled this case in 3 Leon. Willes C. Justice also said, that if it was now *res integra*, he should hold that calling a man a *rogue*, or a woman a *whore*, in public company, were actionable

Slander.
"You are a
rogue, and I
will prove you
a rogue, for
you forged
my name,"
are actionable

Judgment for the plaintiff.

White *versus* Willis. C. B.

TRESPASS for taking the plaintiff's cattle; the defendant pleaded in bar that he distrained for rent, and that the plaintiff levied a plaint in *replevin* before the sheriff of the county, and that the process thereon is still depending in the county court; the plaintiff demurred, and the defendant joined in demurrer

Whether a re-
plevin below
can be pleaded
in bar to tres-
pass in C. B.

note 12. mod 663. 665

Serjeant Poole for the plaintiff insisted the plea was bad for two reasons; First, Because a suit depending in an inferior court cannot be pleaded in bar to an action *here*. 5 Report, 62. a. 7 H. 4. 8. a.

7 H.

C. 79 Lamb v Nutt.

7H. 4. 44. a. b. *Briningham's case*. 43 Ed. 3. 22. 27. 4 H. 6. 15. a. b. and *Trin.* 6 Geo. 2. *Dudfield versus Warden, Fitzgib.* 3. 19.

2dly, If this matter could well be pleaded, it ought to have been pleaded in *abatement*, and not in *bar*; for by pleading in *bar* the defendant admits the cause of action and the writ to be good, but says something more to destroy the plaintiff's cause of action; *abatement* is to some matter which shews the action is ill conceived, but does not go to destroy the action absolutely; and the *replevin* does not bar *trespass*, but the court in this case may give a general judgment that the plaintiff ought to have damages. 2 Mod. 63, 64. 1 Mod. 214. 1 Lev. 312. 2 Ro. Rep. 64. Doct. Placitandi 10. tit. *Pleas in abatement in matters of record in point.*

Hewitt serjeant *econtra* for the defendant as to both the objections said, that a *replevin* differed much from all other actions in inferior courts, and might be pleaded in bar to *trespass* here; and cited Doct. Placitandi 65, 68. 22 Hen. 6. 15.

The court were of opinion that they could give a proper judgment for the plaintiff, although the defendant's plea concluded improperly; and were about to give a general judgment for the plaintiff; but the defendant desired he might withdraw his plea and plead *de novo*, which was granted upon payment of costs to the plaintiff.

Nota; *Willes* Chief Justice said, there is more law and learning in *Doctrina Placitandi* than in any book he knew; that it contained the substance of all the pleadings in the *Year-books*, and *Coke's Reports*.

Driver of the demise of Richard Standring *versus* Mary Standring widow, and John Hoole. C. B.

An executory devise was never made good but for the sake of the intention of the testator.

EJECTMENT, of a messuage and lands in *Epworth* in the county of *Lincoln*, was tried in *Lincoln March* 6, 1758. before Baron *Legge*; verdict for the plaintiff; subject to the opinion of the court upon this case.

John Standring being seised in fee of the premises in question by his will of the 17th of *June* 1753. devised to his brother *Richard* in fee other lands than these now in question, and also other lands to his niece *Eliz. Read*, and then follows the clause upon which the present question depends, in these words, "Item, I give and devise all the rest of my lands, tenements and hereditaments"

"ments (including those now in question) unto the child or children
 "of which Mary my wife is now pregnant and the heirs of such child
 "or children for ever, to be held and enjoyed by them, if more than
 "one as tenants in common and not as jointenants; provided always
 "nevertheless, and my will and mind further is, that if all such child
 "or children shall not be born alive, or shall happen to die without
 "lawful issue and under the age of 21 years, then in either of the *See Devise*
 "said cases I give and devise the house wherein I dwell, and my
 "nearer close in the Haverthwaites, with the appurtenances, to my
 "brother Richard Standring and his heirs for ever; and also in either
 "of the said cases I give and devise my further close in the Haver-
 "thwaites to Mary my wife during the term of her natural life, and
 "from and after her decease to my said brother Richard and his heirs
 "for ever;" and then the testator gives his personal estate to his
 wife and his brother Richard.

The will was duly executed and attested, and was proved at the
 trial; it was also proved, and is further stated in the case, that at
 the time the testator made his will he was very sick and ill, and
 that his wife was pregnant, and on the 5th of September 1753. was
 delivered of a son, and that this son died in the life-time of the
 testator without issue and under age; that afterwards in the life of
 testator he had another child by his same wife born alive, which
 also died soon after its birth in testator's life-time, and that the tes-
 tator himself afterwards on the 17th of September 1756. died seised
 in fee of the premises without revoking or altering his will, leaving
 his wife with child of a daughter, who was soon after born, and is
 now living.

The single question is, whether *Richard Standring*, the testator's
 brother, has any title under this will to the house, &c. wherein the
 testator dwelt at the time of making his will.

This case was argued twice at the bar, the first time in *Michael-*
mas term last, and again in this term.

The serjeants of counsel with the lessor of the plaintiff contended
 that this was a good executory devise to testator's brother *Richard*, it
 being to take place within a reasonable time, that is to say, if the
 child then *in ventre sa mere* should die without issue, or under the
 age of one and twenty years.

On the other side for the heir at law it was argued, that wills are
 to be construed according to the intention of testators, if that can
 possibly be found out; that it is impossible to conceive that when a
 man is providing for a child *in ventre sa mere*, he could ever intend
 that if that child died, any after-born child should be disinherited.

PART II.

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It was also argued that the contingencies which happened after the making the will, in the testator's family, amounted to a *revocation* of the will; but the court were clear of opinion that such alterations in families cannot revoke a will of lands by the laws of *England*, however it may be otherwise by the civil law.

Upon both the arguments the whole court declared, that if by any construction whatever they could be warranted in giving judgment for the defendants in favour of the heir they would do it; at length, after time taken to consider, they all severally declared in court that they would not construe this to be an executory devise; they said that executory devises are contrary to the strict rules of law, and were at first invented in furtherance of justice, and to carry into execution the manifest intention of testators; and that to construe this to be an executory devise, would be to defeat the testator's design, which must certainly be, to provide for any after-born child, and not to disinherit an heir of his own body.

Besides, it was said by Mr. Justice *Bathurst*, and agreed by the whole court, that unless some words were added to the *proviso* as to the child or childrens dying without issue, it could not be construed to be an executory devise, as not being certainly to take place within a reasonable time; for (as he said) there is a great deal of difference between dying without issue, and dying without issue *living at the time of the death or deaths* of such child or children; the first case may not happen in many generations, the latter case will be known within the compass of a life; and they agreed they would not in this hard case supply the want of the words "*living at the time of the death of such child or children*," which would destroy the intent of the testator.

• Vern. 760.
758, 759.

However, although this was the declaration, and seemed to be the opinion of the whole court, yet they did not give judgment one way or other, but desired the lessor of the plaintiff would consider of it, and if he had any humanity or goodness in him, they were sure, he would give the poor infant heir no further trouble. With respect to the cases cited on both sides, they are so little to the purpose that it would be impertinent to put them down; and this case is so particular and singular, that it must be determined merely upon its own circumstances.

Adjournatur.

Witham *versus* Hill and others. C. B.

THIS was an action upon the *stat. 1 Geo. 1. c. 5. s. 6:* for demolishing houses, barns, &c. of the plaintiff at *Sheffield*, in a certain hundred in the county of *York*, brought against the inhabitants of the hundred, in which the plaintiff had a verdict for damages according to this statute.

Costs. ¹
The plaintiff shall have costs in an action on the riot act 1 Geo. 1. c. 5. and in hue and cry.

The words of the statute are, "The inhabitants of the hundred shall yield damages to the persons damnified by such demolition, &c. to be levied on the inhabitants, and paid to such plaintiff by such ways as are provided by 27 *Eliz. cap. 13.* for reimbursing any money recovered by any party robbed." No mention being made of costs in the statute, it now became a question, whether the plaintiff should have costs taxed *de incremento* by the prothonotary.

This being a new case was debated twice at the bar, and many cases cited on both sides, not necessary to be put down here.

After time taken to consider, the court this term gave their unanimous opinion that the plaintiff was intitled to full costs.

Lord C. Justice *Willes*. The plaintiff is intitled to costs; 1st, By the statute of *Gloucester*, 6 *Ed. 1. c. 1. s. 2.* whereby it is provided that the demandant may recover against the tenant the costs of his writ purchased, together with his damages, "and this act shall hold place in all cases where the party is to recover damages;" in all cases are very general words, and in my opinion extend to all actions at common law, and to all actions upon any former or latter statutes where damages are to be recovered; and although the costs of the writ purchased are only mentioned, yet the demandant or plaintiff shall have his whole costs of all the process in the cause. 2 *Inst.* 288.

2^{dly}, The word *damages* in this *stat. 1 Geo. 1.* means costs of suit as well as damages found by the jury; and this construction agrees with all the entries, for when the *damna, misæ, & custagia* are all added together, the entries all conclude thus, "*Quæ quidem damna in toto se attingunt*" to so much.

3^{dly}, The intent of the statute was to reimburse the party injured, and to give him an adequate satisfaction for the damages he hath sustained; but unless we were to adjudge to him his costs of suit, he would not be reimbursed, as the statute intended he should be.

4thly, This *stat. 1 Geo. 1.* as to this matter, is planned from the *stat. 27 Eliz. c. 13.* of *bue and cry*, and says, that damages in the present case shall be levied by such ways as are provided by this statute of *Eliz.* for reimbursing any party robbed: and although no costs are mentioned in the statute of *Eliz.* yet costs have been always allowed in actions upon that statute. 2 *Saund.* 379. in point. Also another case in *B. R. anno 21 Geo. 2.* a copy of which record was now shewn in court.

As to statutes which give double or treble damages, they are considered in a different light from the present, which only gives single damages.

Pilfold's case, 10 *Co. Rep.* 116. seems to me an extraordinary case; however, I do not over-rule it, but think this case very different from it; in the present case the plaintiff might have had an action against the particular persons who actually pulled down his houses and barns, and have recovered his damages and costs against them, if they might have been known and found; and certainly the statute intended to give the party injured the same remedy against the hundred, as he might have had against the trespassers themselves, if they could have been found and come at; and therefore this is very different from *Pilfold's* case.

Clive Justice. I think the rule in *Pilfold's* case, 10 *Rep.* is good law, which says, "That in all cases where man either before, or by the statute of *Gloucester*, 6 *Ed.* 1. should not recover damages, if after the said statute another statute in a new case gives damages either single, double or treble, &c. there the plaintiff shall not recover costs;" this I hold to be good law.

But what is the present case; the *stat. 1 Geo. 1.* which we are now considering, does not create damages in a case where there was none before, for the party, plaintiff in the present case, was intitled to damages against the particular persons who pulled down his houses, at common law; therefore I say damages in this case are not newly created, but the object against whom they are to be recovered is only changed; and therefore I am of the same opinion that the plaintiff must have his costs.

Bathurst Justice. I am of the same opinion. It was objected for the defendants that all the cases and precedents for costs in *bue and cry* have passed *sub silentio*, but that is hardly possible; it will never appear on the face of this record that this matter has been debated, and so may as well be said hereafter that it passed *sub silentio*; the statute of *bue and cry* did not, in my opinion, create damages, but only gave the party robbed a different remedy from what

what he had before; for the party robbed before those statutes might have had an action against the hundred for not keeping *watch and ward*.

The *stat. 27 Eliz. c. 13.* says, the inhabitants of the country shall be answerable for the robberies done and the damages; this word *damages* in this statute means costs, and the present statute under consideration being planned upon it, I am clear of opinion that the plaintiff must have his costs. I think *Pilford's* case is very good law, and am desirous it should not be shaken.

Noel Justice. I am of the same opinion, This *stat. 1 Geo. 1.* is only auxiliary to the party, and not newly creating damages where there were none before. Besides, the *stat. 8 Geo. 2. c. 16.* of *bue and cry* expressly recognizes that the plaintiff shall have costs by the statutes of *bue and cry*.

The Prothonotary was ordered to tax the plaintiff his costs. The declaration in this case was of *Hilary* term 1758.

Crutchfield *versus* Seyward C. B.

PLAINTIFF had bail in the original action, declared in a different county from the writ, so waived his bail; verdict for plaintiff for 98*l.* defendant has brought error, and threatens to go away to *Ireland*, so plaintiff has brought an action on the judgment and held him to bail for 129*l.* debt and costs; defendant has put in bail and justified; it is now moved by serjeant *Hewitt*, that the recognisance of bail may be discharged, which was opposed by serjeant *Davy*, who insisted as there was no bail in the original action, so this case is not within the rule of practice that a man shall not be twice held to bail for the same debt. But *per curiam*, this is like the case of a prisoner who is superfedible for want of proceeding, and afterwards is held to bail for the same debt, which he shall not be, for the plaintiff shall not take advantage of his own act or laches. The recognisance was discharged.

Practice.
Plaintiff having done an act to waive his bail in the original action, shall not have bail in an action on the judgment.

Trinity Term

32 & 33 Geo. 2. 1759.

Fish versus Hutchinson. C. B.

2 B. & H. 613
Promise with-
in the statute
of frauds.

Vide Ld.
Raym. 1087.

IN an action upon the case upon an *assumpsit*, the plaintiff declares, that whereas one *Vickars* was indebted to him in a certain sum of money, and he had commenced an action for the same; the defendant in consideration that the plaintiff would stay his action against *Vickars* promised to pay plaintiff the money owing to him by *Vickars*; to this there is a demurrer and joinder in demurrer.

For the defendant it was insisted, that this being a promise to pay the debt of another person, was void by the statute of frauds and perjuries.

It was answered for the plaintiff, that this was an original contract between the plaintiff and defendant, so not within the statute; and the case of *Read versus Nash* in B. R. in Trinity term, 24 & 25 Geo. 2. was cited as in point.

But *per totam curiam*, this case at bar is very clearly within the statute, for here is a debt of another person still subsisting, and a promise to pay it; and it is not like the case of *Read versus Nash*, for that was an action of assault and battery brought by the plaintiff's testator against one *Johnson*; the cause was at issue, the record of *nisi prius* entred and just coming one to be tried, when the defendant *Nash* being present in court in consideration that plaintiff's testator would not proceed to try his cause, but would withdraw his record, promised to pay him 50*l.* and costs to be taxed in that suit; so in that case there was no debt of another, it being an action of battery, and it could not be known before trial whether the plaintiff would recover any damages or not; but in the present case here is a debt of another still subsisting, and a promise to pay it.

Judgment for the defendant.

The

The Mayor of Exeter *versus* Trimlet. C. B.

Judgment of the court delivered by Willes C. J.

THIS is an action upon the case upon an *assumpsit*, brought to recover a certain sum of money owing by the defendant to the plaintiff for *petit customs*; the declaration contains two counts; the first sets out a prescriptive right to petit customs, and that defendant was liable to pay the same, and being so liable promised payment thereof. The second is a general *indebitatus assumpsit* for a certain sum due to plaintiff for petit customs, and that the defendant being so indebted promised payment.

Assumpsit lies
for petit cu-
stoms.

5d 13773

To this declaration the defendant has demurred generally, and the plaintiff has joined in demurrer.

For the defendant it has been objected that the plaintiff hath not shewn any title to have petit customs, that they could not be granted, so plaintiff could not properly prescribe for them; 2dly, That there is no consideration whereon to ground an *assumpsit*, and this is a demand against common right; and many cases have been cited, all which I shall lay out of the case.

We are all of opinion that petit customs may well be granted, and plaintiff intitled by prescription, and have no doubt at all but that the first count is good, and would have been so, even upon a special demurrer. We give no positive opinion as to the second count, but we incline to think, that this is also well enough, upon a general demurrer; and if the defendant had pleaded *non assumpsit* the plaintiff at the trial would have been obliged to shew his right to petit customs. This case is like the case of an *indebitatus assumpsit* for money had and received for the plaintiff's use, which has often been brought in order to try a right to an office, in which the plaintiff, upon *non assumpsit* pleaded, must, at the trial, shew his right to the office. We are all of opinion to over-rule the demurrer.

Judgment for the plaintiff.

Nota; There was a similar determination in the case of *The Town of Tarmouth versus* ~~later~~ *B. R.* in Trinity term. 3 Geo. 3. 1763, and the case of *The City of Exeter and Trimlet*, held to be good law. *Vide* 3 Lev. 37, *Mayor and Com. of London versus Hunt*.

3 Bun.

Palmer

Palmer *versus* Stone and another. C. B.

Declaration in
trespass for
impounding
plaintiff's
mare.

THIS is an action of trespass, in which the plaintiff declares, that on the 15th of June 1758. at *Barking* in *Essex*, the defendants with force and arms took and impounded the plaintiff's mare, and detained her in the pound from that day 'till the commencement of this action.

The defend-
ant's plea.
Damage-fea-
sant to the
King in his
forest of
Waltham.

The defendants plead in bar, that the plaintiff ought not to have his action against them, because they say that before the time the trespass is supposed to have been done, his present Majesty was, and still is seised in fee of the forest of *Waltham* in right of his crown; and being so seised, because the mare was in the King's forest eating up, treading down, depasturing, spoiling and consuming the grass growing in the forest, and doing damage there to the King, the defendants (as his servants) seised and took the mare so doing damage, and impounded her at *Barking* as such distress; and this they are ready to verify, &c.

Plaintiff's re-
plication.
That A. F. is
seised of mes-
suage and land
near the forest
and has a
right of com-
mon in the
forest for one
mare or one
gelding.

The plaintiff replies, that he ought not to be barred from having his action against the defendants because he says that *Ann Francia* widow, long before, and at the time this trespass was done, was, and still is seised in fee of an antient messuage and seventy acres of land in *Dagenham* near the forest of *Waltham*, and that she and all those whose estate she now hath, and had (at the time of the trespass) in the messuage and lands, have immemorially had, and have been used and accustomed to have, and of right ought to have for themselves, their farmers and tenants, of the messuage and lands, common of pasture in the forest of *Waltham*, for one gelding, or for one mare, in the place and stead of one gelding, for and in respect of every eighty shillings annual rent of the messuage and lands every year, at all times of the year, except in the fence-month, as belonging and appertaining to the messuage and lands: That *Ann Francia* being so seised of this farm, upon the 7th of September 1757. demised the same to the plaintiff, to hold from the 29th of that month for the term of one year, and from the end of that year from year to year as tenant at will; by virtue of which lease the plaintiff entred upon the farm, and at the time of the trespass was and ever since hath been, and now is possessed thereof. And the plaintiff further says in reply, that at the time when the trespass was done, the yearly rent of the farm exceeded sixty pounds, and that upon the 15th of June 1758. (and out of the fence-month) he

In respect of
every 80s.
rent, every
year, at all
times of the
year, except
in the fence
month.

That A. F.
demised to the
plaintiff who
entred and is
possessed.

And that at
the time of
the trespass
the rent of the
farm exceeded

60l. per annum, and that (out of the fence month) plaintiff put his mare into the forest to use his common, when defendants of their own wrong took and impounded her.

put the mare into the forest of *Waltbam* to depasture there, and to use his common, and that she was eating the grafs there with other of his cattle until the defendants, of their own wrong, took and impounded her; and *this* the plaintiff is ready to verify; wherefore since the defendants have acknowledged *that* trespass, he prays judgment and his damages.

The defendants rejoin that the mare, at the time when they took and impounded her, was sick, ill of, and labouring under a certain catching infectious distemper called the mange, and certain other catching and infectious distempers; and being so sick, ill, and distemper'd, was wrongfully and unlawfully in the forest eating up, treading down, depasturing, spoiling and consuming the grafs, and doing damage there, and therefore the defendants seized the mare so doing damage there as a distress for that damage, and impounded her as such distress, as they have before alledged in their plea; and *this* they insist was lawful for them to do; and say they are ready to verify it; wherefore they pray the judgment of the court.

Defendant's rejoinder.
That the mare was mangy, and doing damage, and therefore defendants took and impounded her, because she was wrongfully and unlawfully in the forest.

The plaintiff surrejoins, that notwithstanding any thing alledged by the defendants in their rejoinder, he ought not to be barred of his action, because he says that the mare was lawfully depasturing in the forest in the manner which the plaintiff has before alledged; *without this*, that the mare was wrongfully and unlawfully in the forest of *Waltbam*, eating up, treading down and consuming the grafs, and doing damage there, in manner and form as the defendants in their rejoinder have alledged; and this he is ready to verify; wherefore (as before) he prays judgment and his damages.

Surrejoinder of the plaintiff

Traverse
abfq; hoc that the mare was wrongfully and unlawfully in the forest, &c.

The defendants by their *rebutter* take issue on the traverse, that the mare was wrongfully and unlawfully in the forest, eating up treading down, depasturing, spoiling and consuming the grafs there growing, in manner and form as the defendants have in their rejoinder alledged; and conclude to the country.

Rebutter takes issue on the traverse.

The plaintiff does not join issue to the country, knowing very well that if such an issue had gone to a jury, and they had found a verdict one way or other, it would have been a mistrial, as it refers a matter of law to the lay gents; and therefore (to prevent delay, which must otherwise have happened) the plaintiff demurred, and the defendants have joined in demurrer.

Demurrer.
Joinder in demurrer.

This is a state of the pleadings so far as they concern the present issue in law before the court; and although it must be admitted that the plaintiff's *surrejoinder* is bad, as it traverses a matter of law, yet if it can be shewn that the defendants *rejoinder* is likewise bad, then the plaintiff must have judgment, unless it can be shewn on the other

Counsel for plaintiff.

other side that the *declaration* or the *replication* are bad; for it is an established rule, that whoever makes the first fault in pleading shall have judgment against him.

This rule being premised, the principal point first insisted upon for the plaintiff is, that the *rejoinder* of the defendants is a *departure* from their plea, and therefore bad; and if it be necessary, shall further shew that it is bad upon the merits in point of law.

A departure,
what it is.

A *departure* in pleading, is when a man quits, or departs from, one defence which he has first made, and has recourse to another; it is when his second plea contains matter not pursuant to his first plea, and which does not support and fortify it. *Co. Lit.* 304. a.

One good reason why a *departure* in pleading is never allowed is, because records would by such manner of pleading be spun out into endless prolixity; for if it were to be allowed, then he who has departed from, and relinquished his first plea or defence, might resort to a second, third, fourth, or fortieth defence; pleading in this manner would become infinite; he who has a bad cause would never be brought to an issue, nor could he who has a good one, ever obtain justice, the end of his suit. Other reasons might be given why a *departure* in pleading is never allowed, but *this* alone is sufficient.

Having shewn what is a *departure*, and why it is bad in pleading, it shall now be my endeavour to shew that the defendants have in their rejoinder departed from their first defence made by their plea.

The defendants in their plea justify the taking and impounding the mare, doing damage to the King, the owner of the soil of *Waltham* forest, which is a private trespass: but they have departed from *that* defence and resorted to *another*; that is, they say in their rejoinder that the mare was sick and ill of a catching infectious distemper called the *mange*, and of other infectious distempers, and being so sick, ill, and distemper'd, was wrongfully and unlawfully in the forest eating up the grafs and doing damage; this is not a private trespass but is an offence of a public nature, is a common nuisance, and punishable as such, as appears by the *stat.* 32 H. 8. c. 13. s. 11. whereby it is enacted, " That no person or persons
" after *Michaelmas* then next shall have or put to pasture any horse,
" gelding or mare, infect with scab or mange, in, to or upon any
" forests, chaces, moors, marshes, heaths, commons, waste grounds,
" or common fields, upon pain to forfeit for every horse, gelding
" or mare, *so* infect, pasturing in any of the said grounds, ten
" shillings; which offence shall be inquirable and presentable
" before the steward in every leet, as other common annoyances
" be;

" be; and the forfeiture therefore to be to the lord of the same leet
" where the said offences shall be presented."

Again; the defendants by their plea directly and positively affirm the mare was distrained and impounded, because she was doing damage to the King, by eating up, treading down and consuming the grafs growing upon his freehold; but in their rejoinder they do not affirm any such thing, they only say the mare was mangy, and being so, was doing damage there; damage!—To whom?—Not to the King, or his freehold, they have not said so—but would have the court conclude by way of argument or inference that this was a private trespass on the King's freehold, and not a public nuisance or common annoyance; this being an argumentative rejoinder as well as different from the plea is bad, for that matters of fact ought to be certainly and positively alledged in pleadings, and are not to be made out to the court by argument or inference.

A departure in pleading is so very well understood, that it would be impertinent to cite cases; if the court should be of opinion that this is a departure, it will not be necessary for me to say any thing more at present, or to shew that the rejoinder is also bad in other points of law; but if the court should incline to think this is not a departure, after they have heard my brother, then I shall beg leave to be at liberty further to shew that the plea is in other respects ill pleaded and bad in point of law.

Counsel for the defendants. Notwithstanding what has been insisted upon on the other side, I shall shew at the rejoinder is not a departure from the plea, but discloses new matter in fortification thereof; that the mare was infected with the mange, and consequently the plaintiff, though he had a right of common, was a trespasser *ab initio*, from the time he put her into the forest. A right of common for cattle, is no more than a *profit appendre* in *alieno solo*, a liberty for a man to take the grafs by the mouths of his beasts, not by beasts that are not commonable, not by mangy and infected beasts, not by the mouths of pigs not rung, *sic utere tuo ut alieno non lædas*, every man must so use his own as not to injure another. Will the other side venture to say that if a man, who has a right of common upon my soil for horses, mares or geldings, puts into it mad, wild horses, which bite, strike and destroy every creature they come near; that these are commonable cattle, and that I cannot take and drive them to a pound overt as damage-feasant?

It was determined in the King's Bench, that pigs put upon a common without being rung may be distrained *damage-feasant*, a *fortiori* you may distrain a mangy mare; the case was *Kenchin* and
Knight

Knight, which was determined in *Michaelmas* term in the twenty-third year of his present Majesty, a note whereof I took with my own hand; it was an action of trespass for taking and impounding the plaintiff's pigs; the defendant justified for *damage-feasant*, as in the case now at bar; the plaintiff replied, and prescribed for a right of common exactly like the prescription in the present case; the defendant rejoined by alledging the pigs ought to be rung before they were turned on to the common, which they were not, and so were trespassers; to this rejoinder the plaintiff demurred, and the defendant joined in demurrer; this was held to be a good rejoinder, and not a departure, and judgment was given for the defendant; and the plaintiff's pigs not being rung, the court held he was a trespasser; and Mr. Justice *Denison* said, and the rest of the court agreed, that no man need to alledge more in his plea at first than what amounts *prima facie* to a sufficient answer to the declaration.

Lord C. Justice. I have heard enough to convince me there are faults in the pleadings on both sides; each side shall amend without payment of costs.

Counsel for plaintiff. My Lord I do not desire to amend any tittle of the pleadings on my side, for (with deference to the court) the question is not, whether there are faults in the pleadings on both sides, but who made the first fault; for it is an established rule in pleading, that whoever makes the first fault shall have judgment against him; and this is so universally true, that a single case to the contrary cannot be shewn; besides, every one knows that nothing is more common (among good pleaders) than to give a frivolous answer to a bad plea (which deserves no better.) Besides this I shall shew the court, that the case of *Kenchin* and *Knight*, cited by my brother, has been mis-stated by him, by mistake, (I am sure) without any design to mislead.

Lord C. Justice to the plaintiff's counsel. If you insist upon replying, to be sure we will hear you; so go on.

Counsel for the plaintiff. Your Lordship being so good to hear me in reply, it shall be my endeavour to give an answer to what my brother has insisted upon as law, and to the case he has cited.

I shall begin with his case, which if I am not very much mistaken, he has not stated rightly. He has insisted that the rejoinder in the case at bar is not a *departure*, but discloses new matter pursuant to the plea; and, to prove this, has cited a note of *Kenchin* and *Knight*, which he took with his own hand. My brother indeed is a very good note taker, but in this particular case he

he has not been so accurate as he generally is, unless I have much mistaken it.

* The case of *Kenchin* and *Knight*, according to my own note of it, was argued twice in the King's bench; the last argument was in *Michaelmas* term in the 23d year of his present Majesty, by two of the (then) most learned gentlemen at the bar, Mr. *Ford* for the plaintiff, and Mr. *Henley* (the present Lord Keeper of the Great Seal) for the defendant; and upon *that* argument, the court gave judgment without taking further time: it was an action of trespass *quare clausum fregit*, for several trespasses, but the only trespass then in question was for the defendant's putting in his swine into the plaintiff's close. The defendant pleaded a custom that all the tenants and occupiers of certain antient messuages in the tithing of *Woodmancott* in *Hampshire* had a right of common in the place where the trespass was supposed to be done, as belonging to the same, for all their cattle and swine *levant and couchant* on those messuages, and under that custom the defendant justified the putting his swine into the plaintiff's close. The plaintiff replied, and admitted the custom in the very words it was alledged in the plea, so far as the defendant had pleaded it; but then the plaintiff went on farther and alledged that there was another custom besides, and *that* was, "That the tenants and occupiers in *Woodmancott* have been used and accustomed time out of mind to ring, and of right ought to ring their swine *so* put upon the common, to prevent their rooting up the soil; and that the defendant put his swine into the common without ringing them, and therefore the plaintiff alledged he was a trespasser;" to this replication the defendant *Knight* demurred generally, and the plaintiff joined in demurrer. This is a true state of the record of *Kenchin* and *Knight*, so far as it relates to the trespass by the swine, which was the only matter in debate.

* The record of *Kenchin* and *Knight* is entered of Hilary term 22 Geo. 2. B.R. Roll 179.

The principal objection in the case was made to the replication; Mr. *Henley* insisted it was bad, because the plaintiff had therein set out a different custom from *that* which was alledged by the defendant in his plea, without traversing *that first custom* pleaded, which, he said, tended to make pleadings endless; and cited many cases for his purpose, not now necessary to mention. But the court notwithstanding gave judgment for the plaintiff. Lord Ch. Justice *Lee* said, "That (generally speaking it is true) when a particular custom is pleaded, another custom repugnant to it cannot be replied without traversing the custom (insisted upon) in the plea; for if it were otherwise, pleadings would run out to an infinite length; but *that* is not the case, (said he) for the plaintiff in his replication admits the custom in the plea so far as it goes, and then says there is another thing to be done, (which is very con-

PART II. D d "sistent

“sistent with the custom alledged in the plea), and *that* is, you must ring your swine, and you have not done so, therefore you are a trespasser; this is not different from, but only a qualification of the custom in the plea, and reduces the merits of the cause to one single point, the true end of good pleading.”

The other three Judges, *Wright*, *Denison* and *Foster*, gave their opinions to the same effect; Mr Justice *Foster* (indeed) at first doubted, but at length he said he considered the custom in the replication as another custom consistent with *that* in the plea, and agreed with the rest of the court, that judgment should be given for the plaintiff, and so it was.

This is the true state of the case of *Kenchin* and *Knight*, and is not at all like the case at bar; my brother cited it to prove that it was lawful to distrain swine *damage-feasant* upon a common (that were commonable cattle by the custom of the place) doing damage if they were not rung, and that the rejoinder was not a departure; and taking his state of the case to be right, would induce the court to think it extremely like the present case; for (says my brother) though I admit you have a right of common for your mare, yet if she is mangy she is not commonable, and you are a trespasser against the owner of the soil, just as the owner of the swine in the case cited was, because he put them upon the common without ringing them; and therefore the mare has been legally distrained, because she was doing damage by being mangy.

With great deference to the court, if the case cited was really as my brother has stated it, yet it differs much from the case at bar, for the case cited depended entirely on the particular custom of the place in which, &c. and on the circumstance of ringing the swine which were not commonable unless they were rung, but the case at bar depends upon the general law of the kingdom with respect to common of pasture, and is touching cattle commonable of common right; a swine unrung roots up the ground, and so does real damage to the owner of the soil; a mangy mare does no hurt to the owner of the soil.

It is very strange that my brother and I should differ totally in the state of this case of *Kenchin* and *Knight*, for there is not a single tittle of it we agree in; my brother says it was an action for taking and impounding the plaintiff's swine; I say it was trespass *quare clausum fregit*, and that they were the defendant's swine; he says the defendant *Knight* justified taking the swine of the plaintiff *damage-feasant*; I say there was not a word about *damage-feasant*, but that the defendant justified putting in his swine into the plaintiff's close under a custom of right of common for his swine. My brother says the court gave judgment for the defendant (which indeed

indeed must have been so, if his state of the case be right) but I say judgment was given for the plaintiff; and to prove the truth of what I say, I have a copy of the record of *Kenchin and Knight*; this case was cited to shew that under certain circumstances commonable cattle may be distrained *damage-feasant* on a common where they have a right to be put, which it by no means proves, because there is not one word of a distress *damage-feasant* in the record of *Kenchin and Knight*, nor was there one word said in it about a *departure*.

I have now done with my brother's case, and if it was as he states it, yet, with great deference to the court, and my brother's pardon, it is not opposite to the question now before the court, which is, whether the plaintiff, who confessedly has a right of common for his mare in *Waltham* forest all the year, except in the fence month, can be a trespasser in point of law for putting his mare at a proper season upon the forest, merely by her becoming mangy afterward; for unless this, in point of law, be a private trespass against the owner of the soil, the mare could not be legally distrained *damage-feasant*; and therefore whether the rejoinder be a *departure* or not, yet it is bad upon the merits in point of law.

The plaintiff's right of common for a mare is not denied, and therefore must be considered as admitted; it is not alledged in any part of this record at bar that the mare was mangy at the time she was put upon the forest, nor does it appear that, after she became mangy, the plaintiff had any notice thereof before she was distrained and impounded, and the court will not presume any man guilty of an offence which is neither alledged nor proved against him; the mare might be found when she was first put into the forest, and might catch the distemper *there* of other cattle, for any thing that appears to the contrary.

In further support of what I before said, that a distress for *damage-feasant* as set forth in the plea, and such a distress as is in the rejoinder (if any such can be legally made) are very different: a distress for *damage-feasant* is by the common law or custom of the whole realm, as appears in *Fleta*, lib. 2. cap. 47. sec. 25. fo. 101. where it is said, if he who takes and impounds cattle has an action brought against him, he may say by way of plea or defence that he took the beasts justly, "*quia invenit illa in dominico suo & secun-*" "*dum legem & consuetudines regni imparcavit illa donec dampnum*" "*suum fuerit emandatum;*" so that distress *damage-feasant* is confined singly to a private trespass, and cannot be made for any other cause or offence whatever; and the law is very strict with respect to this kind of distress, for however reasonable it may be, that the owner of the land may defend his property by taking or impound-

ing the cattle or thing doing the trespass, until satisfaction in damages be made, yet if the cattle are but gone one inch from (off) his land when he seises them, he becomes a wrong-doer; they must be *infra dominium suum* when he takes them; and this kind of distress can be only for a trespass upon private property or possession. But what is the distress pleaded in the rejoinder? it is not for a private trespass, but for a public nuisance; it is not for a single particular trespass done to the owner of the soil alone, but for a common annoyance to all the commoners upon *Waltham* forest, and if (in any part of the kingdom) a distress for this kind of nuisance or annoyance can be lawful, it can only be so under some particular custom of the place, and not by the common law, or general custom of the realm; and therefore if any such custom or law of the forest exists, it ought to have been pleaded, otherwise the court can take no notice of it; the forest law is not the general law of the land, and the King's courts *here* are not bound to take notice of it, unless it be pleaded.

Manwood.

The offence in the rejoinder is declared by the *stat. 32 H. 8.* (as mentioned before) to be a common annoyance, and is presentable and finable in the leet, *that* is the proper remedy, and with great deference there is no *other*: No action of trespass in this case will lie for the lord or any one commoner, for if one may have an action, a thousand commoners may, and this would be inconvenient, and create an infinite number of suits; I rely upon this, that where an action of trespass *vi & armis* will not lie, a distress for *damage-feasant* cannot be made. Whether a commoner may not have an action of *trespass upon the case*, is another consideration; it is sufficient for my purpose if he cannot have *trespass vi & armis*, for if he cannot, neither can he distrain for *damage-feasant*.

I have now done, and submit it with great deference to the court, that the defendant's rejoinder is a *departure*, as it contains matter very different from *that* insisted upon in the plea in bar, and that it does not support or fortify the same; or if the court shall be of opinion that it is not a departure, I apprehend it is bad upon the merits in point of law, for that it is no where alledged in this record that the mare was mangy at the time when she was put into the forest or that the plaintiff ever had notice that she was mangy before she was distrained: and for any thing that appears to the contrary she was very sound and well when first put into the forest, and might *there* catch the distemper from the cattle of the defendants themselves; and for these reasons I pray judgment for the plaintiff.

Lord Ch. Justice to plaintiff's counsel. Will you be content to take 40 s. costs, and let the defendants amend their pleadings.

Plaintiff's

Plaintiff's counsel. I have no authority to consent, and humbly pray your Lordship's judgment, or if the court thinks the defendants ought to have leave to amend their pleadings, I am willing to consent they shall amend them, upon paying the plaintiff his costs to be taxed by the Prothonotary.

Ch. Justice. If you will not consent to take 40s. costs, the cause must stand over for further consideration.

Then the clerk to plaintiff's attorney being in court, stood up, and said, that rather than his master could consent to take 40s. costs, or the cause be further delayed, he should desire the costs might attend the final event of the cause, and desired the plaintiff's counsel to consent that the defendants might amend their pleadings, and the costs abide the end of the suit.

Afterwards the defendants (by consent that the costs already incurred should attend the event of the cause) withdrew all their pleadings, being convinced at length, that they were all bad from beginning to end; and pleaded a custom of the forest for seising and impounding mangy cattle being thereon; and alledged that the plaintiff's mare was mangy when she was put into the forest, and justified the impounding her under the custom; the plaintiff replied that the mare was sound and well, and not labouring under any catching or infectious distemper whatsoever; and traversed *without this*, that the mare at the time when, &c. was sick and ill of, and labouring under a catching and infectious distemper called the mange, as the defendants have alledged in their plea; and thereupon issue was joined, and tried at the assises for *Essex*, when a verdict was found for the plaintiff, and he had judgment for his damages, and *all* his costs at last.

Whitworth qui tam, &c. *versus* The Hundred of Grimshoe. C. B.

Cooke.

Norfolk, **T**HE men inhabiting the hundred of *Grimshoe* in the said county were attached to answer as well to our Lord the now King as to *John Whitworth*, in a plea of trespass and contempt, against the form of the statute of *bue and cry* in such case made and provided, and so forth; and whereupon the said *John*, who sues as well for our said Lord the King as for himself, by *John Mayer* his attorney complains, that two certain malefactors to the said *John Whitworth* unknown, on the 13th day of February in the year of our Lord 1759. in the King's highway, to

Declaration in
bue and cry.

N.B. If some Inhabitants are named all need not. F. N. B. 33.

PART II.

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wit, at the parish of *Hockwold with Wilton* in the said hundred of *Grimshoe* in the said county of *Norfolk*, with force and arms assaulted him the said *John Whitworth*, and feloniously took and carried away from the said *John Whitworth* the monies of the said *John Whitworth* to the value of 82*l.* 12*s.* 9*d.* and also three canvas purses of the value of one shilling, and one silver watch of the value of five pounds, of the proper goods and effects of the said *John Whitworth* then and there found, against the peace of our said Lord the King; and the said *John Whitworth* immediately after the said felony and robbery was committed, to wit, on the same day and year at the village of *Metbwold* in the hundred aforesaid, near to the place where the said robbery was committed, made *bue and cry* of the said robbery, and gave notice thereof to the inhabitants of *Metbwold* aforesaid, and also with as much convenient speed as might be after the said robbery was committed, to wit, on the same day and year at *Feltwell* within the hundred aforesaid, and near to the place where the said robbery was committed, gave notice thereof to *Ambrose Whiteman*, then a constable of *Feltwell* aforesaid; and in the said notice so given to the said constable described, as far as the nature and circumstances of the case did admit, the said felons and the time and place of the said robbery, and also within the space of twenty days next after the said robbery was committed, to wit, on the 24th day of *February* in the year aforesaid caused public notice thereof to be given in the *London Gazette*, and therein described, as far as the nature and circumstances of the case did admit, the said felons and the time and place of the said robbery, together with the said money, goods and effects whereof the said *John Whitworth* was so robbed as aforesaid; and afterwards and before the day of the issuing of the original writ of him the said *John Whitworth*, to wit, on the 25th day of *May* in the year aforesaid, he the said *John Whitworth* went before *William Ward*, deputy to *George Greene* filazer of the said county of *Norfolk*, and entred into a bond to *John Stallon* and *John Frost*, then high constables of the hundred of *Grimshoe* aforesaid, in the penal sum of 100*l.* with two sufficient sureties, to wit, *John Booth* and *William Wildman*, approved by the said *William Ward*, with condition for securing to the said high constables the due payment of their costs after the same shall be taxed by the proper officer, in case that he the said *John Whitworth* should happen to be nonsuited, or should discontinue his action in this behalf, or in case that judgment should be thereon given against him on demurrer, or that a verdict should be given against him thereon, according to the direction of the statute in such case lately made and provided; and the said *John Whitworth* after the said felony and robbery was committed, and within twenty days next before the day of the issuing of the said original writ of him the said *John Whitworth*, to wit, upon the 16th day of *May* in the same year was examined upon his corporal oath before

Andrew

Andrew Taylor, Esq; then one of the justices of our Lord the King, assigned to keep the peace of our said Lord the King in and for the said county, inhabiting near unto the said hundred of *Grimshoe*, according to the form of the statute in such case made and provided; and the said *John Whitworth* upon his oath then said, that he did not know either of the said persons who committed the said robbery, and 40 days and upwards have passed since the said robbery was committed, and the said public notice thereof given in the said *London Gazette*, and before the issuing of the said original writ, yet the said men inhabiting within the said hundred of *Grimshoe*, have not hitherto made amends to the said *John Whitworth* for the said robbery, nor have taken the bodies of the said felons, nor the body of either of them, nor have they hitherto answered for the bodies of them, or the body of either of them, but have permitted the said felons to escape, in contempt of our said Lord the King, and to the great damage of him the said *John Whitworth*, and against the form of the statute in such case made and provided; and also that afterwards, to wit, on the day and year first aforesaid, two other malefactors to the said *John Whitworth* unknown, in the King's highway at the said parish of *Hockwold with Wilton* within the said hundred of *Grimshoe* in the said county of *Norfolk*, with force and arms assaulted him the said *John Whitworth*, and feloniously took and carried away from the said *John Whitworth* other monies of the said *John Whitworth* to the value of 82 l. 12 s. 9 d. and also other three canvas purses of the value of one shilling, and one other silver watch of the value of five pounds, of the proper goods and effects of the said *John Whitworth* then and there found, against the peace of our said Lord the King; and the said *John Whitworth* immediately after the felony and robbery last mentioned was committed, to wit, on the same day and year at the village of *Methwold* in the hundred aforesaid near to the place where the said last mentioned robbery was committed, made hue and cry of the said robbery, and gave notice thereof to the inhabitants of *Methwold* aforesaid, and also with as much convenient speed as might be after the said last mentioned robbery was committed, to wit, on the same day and year at the town of *Brandon* in the county of *Suffolk* near to the said hundred of *Grimshoe*, and near to the place where the said last mentioned robbery was committed, gave notice thereof to *John Newton*, then a constable of *Brandon* aforesaid, and in the said notice so given to the said constable described, as far as the nature and circumstances of the case did admit, the said last mentioned felons, and the time and place of the said last mentioned robbery, and also within the space of twenty days next after the said last mentioned robbery was committed, to wit, on the 24th day of *February* in the year aforesaid, caused public notice thereof to be given in the *London Gazette*, and therein described, as far as the nature and circumstances of the case did admit, the said last

last mentioned felons, and the time and place of the said last mentioned robbery, together with the said last mentioned money, goods and effects whereof he the said *John Whitworth* was so robbed, as is last abovementioned; and afterwards and before the day of the issuing of the original writ of him the said *John Whitworth*, to wit, on the twenty-fifth day of *May* in the year aforesaid, he the said *John Whitworth* went before *William Ward*, deputy to *George Greene* then filazer of the said county of *Norfolk*, and entred into another bond to *John Stallon* and *John Frost*, then high constables of the hundred of *Grimshoe* aforesaid, in the penal sum of 100*l.* with two sufficient sureties, to wit, *John Booth* and *William Wildman*, approved by the said *William Ward*, with condition for securing to the said high constables the due payment of their costs, after the same should be taxed by the proper officer, in case that he the said *John Whitworth* should happen to be nonsuited, or should discontinue his action in this behalf, or in case that judgment should be given against him on demurrer, or that a verdict should be given against him thereon, according to the direction of the statute in such cases lately made and provided; and the said *John Whitworth* after the said last mentioned felony and robbery was committed, and within twenty days next before the day of the issuing of the said original writ of him the said *John Whitworth*, to wit, upon the 16th day of *May* in the same year was examined upon his corporal oath before *Andrew Taylor*, Esq; then one of the justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the said county of *Norfolk*, inhabiting near unto the said hundred of *Grimshoe*, according to the form of the statute in such cases made and provided; and the said *John Whitworth* upon his said oath then said that he did not know either of the said persons who committed the said robbery last mentioned, and forty days and upwards have passed since the said last mentioned robbery was committed, and the said public notice thereof given in the said *London Gazette*, and before the issuing of the said original writ, yet the said men inhabiting within the said hundred of *Grimshoe* have not hitherto made amends to the said *John Whitworth* for the said last mentioned robbery nor have taken the bodies of the said last mentioned felons, nor the body of either of them, but have permitted the said felons, to escape, in contempt of our said Lord the King, and to the great damage to him the said *John Whitworth* and against the form of the statute in such cases made and provided, whereby the said *John* saith that, he is injured, and hath damage to the value of one hundred and fifty pounds; and thereupon he brings suit.

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guilty.

And the said men inhabiting the hundred of *Grimshoe* aforesaid by *Robert Moxen* their attorney come and defend the force and injury when, &c. and all contempt, and whatsoever, &c. and say that they are in no wise guilty of the premises above laid to their charge,

charge against the form of the said statutes, as the aforesaid *John Whitworth*, who as well, &c. above complains against them; and of this they put themselves upon the country, and the said *John* likewise.

At the trial of this cause the following case was made for the opinion of the court of Common Pleas

Hilary Term

33 Geo. 2. 1760.

Whitworth *qui tam*, &c. *versus* The hundred of Grimshoe in Norfolk. C. B.

IN an action upon the statutes of *hue and cry*, wherein the plaintiff obtained a verdict for 85 *l.* 16 *s.* 9 *d.* damages and 40 *s.* costs at *Norfolk* summer assises 1759. on the issue tried before Mr. Justice *Denison*, subject to the opinion of the court upon the following case.

Hue and cry.

Upon evidence it appeared that on the 13th of *February* 1759. about half an hour after four o'clock in the afternoon, the plaintiff set out on horseback from *Brandon* in *Suffolk* for *West Wynch* near *Lynn* in *Norfolk*, and after having passed through *Weeting*, (a village about a mile from *Brandon*) and gone about two miles beyond *Weeting*, he was stopped on the highway in the evening while it was light about five o'clock, by two men on foot in sailors habits, unknown to plaintiff, who had large clubs in their hands, one of which men caught hold of plaintiff's horse's bridle, and demanded his money, and on plaintiff's striking him with the great end of his whip, he fell down with his arms entangled in the bridle, and the horse fell down, upon which the other man (being the tallest) then knocked plaintiff off his horse with a club, and gave him several blows on the head, which stunn'd him for some time, and then the said two men robbed him of 82 *l.* 12 *s.* 9 *d.* in money, consisting

Case for the opinion of the court.

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of 36s. pieces, moidores, half moidores, 18s. pieces, guineas, and half guineas, in three canvas bags or purses, and some loose money amounting to 3s. 6d. in silver, and some halfpence, and also of some other money as hereafter mentioned, and also of the said three canvas bags or purses and a silver watch, the maker's name *Clay, London*, but the number forgotten, and the point of the hour hand was broke off, to which was affixed a black ribband and a watch, key; that one of the said three bags or purses was a double bag or purse, and that part of the said money was at one end of it, and that the other end was quite worn through, and had a hole in it; that one of the said men was tall and lusty, had a brown woollen cap or bonnet on, and a blue jacket, was of a fresh complexion, had particular large red eye brows and full ruddy cheeks, by either of which plaintiff thinks he could have known him from any other person; that the other was a middle sized man of a dark complexion, had on a narrow cut brimed hat bound round with black ferret, and a blue jacket, that they turn'd his horse loose, and went off towards *Hockwold with Wilton*; that he followed his horse to *Methwold Lodge*, being about a mile from the place where the robbery was committed, and which is in the parish of *Methwold*, and about a mile from the town of *Methwold* in the road from *Weeting* to *West Wynch*, but being much bruised and weak through loss of blood, he was half an hour in getting there; and that at the said lodge he gave notice to *Thomas Hepworth*, (who lived there, and who from the description given by the plaintiff said he had seen the robbers that day in the way to *Brandon*) and several other persons then assembled there, of the said robbery, and desired some of the said persons to pursue the robbers, but that no body cared to go as the night was coming on; that thereupon the said *Thomas Hepworth* helped him to his horse, and advised him to go to *Methwold*, (being then the nearest village or town) which is about a mile further on towards *West Wynch*, and get people to go after the robbers, but that the plaintiff knowing *Mr. Osborn Denton, sen.* of *Weeting*, whom he knew to be an active man, turned back and went to *Weeting* with *Osborne Denton, jun.* his son and some other persons who were at *Methwold Lodge*, but that *Osborn Denton, sen.* not being at home, he there called at two alehouses, and told several people of the robbery, as set forth in the *Gazette*.

That it appeared in evidence there were two constables in *Weeting* living near the road side where plaintiff passed, but that he did not give any notice of the robbery to either of them, nor leave any notice thereof in writing at either of their houses, but the plaintiff did not know nor had been informed that there were such constables till after he arrived at *Lynn* the day afterwards; that from *Weeting* he went immediately back to *Brandon*, the next parish to, and about a mile from *Weeting*, and arrived there much disordered with his wounds, loss of blood and fatigue, at the *Cbequer inn*, between

tween 6 and 7 o'clock that night, and immediately told one *John Hookham* of the robbery, and ordered him to go and pursue the robbers, and take what method he could to apprehend them, at his expence; that thereupon *Hookham*, with a soldier who was furnished with a horse by plaintiff for that purpose, and who is now on duty in the army, went to *Weeting*, *Wilton*, *Hockwold* and *Feltwell*, and searched about those towns for the robbers, but could not find them; that when *Hookham* was at *Feltwell*, which is five miles from *Brandon*, and not before, he inquired for and told one *Ambrose Whiteman*, the constable of that parish, of the robbery in the manner described in the *Gazette*, and also that immediately after plaintiff's arrival at *Brandon*, he sent one *John Brown*, the hostler of the said inn, for *John Newton*, one of the constables of *Brandon*, to inform him of the robbery; that the said *Brown* went to the said constable's house and called at the window, and asked for the said *John Newton*; that a person, whom by the voice he took to be a woman from within the said house, asked what he wanted with him, to which the said *Brown* answered, "I want to tell him that *John* the drover (who was known to *Newton*) has been robbed, and wants him;" and thereupon the said person within replied that the said *Newton* was not at home; that the said *Brown* returned and told plaintiff that *Newton* the constable was not at home; that plaintiff did not inquire for any other constable of *Brandon*, though there was another constable of that town, (one *Secker*) but who had never acted in his office, and the plaintiff was not informed of him till the next morning; that the plaintiff being that morning about seven o'clock at the surgeon's who dressed his wounds, *Newton* the constable came to him and told him that he had heard that the plaintiff had been robbed, and had sent for him (*Newton*) the night before, and was sorry he was not at home; that thereupon plaintiff gave *Newton* an account of the robbery as in the *Gazette* that that morning in order to make out the exact sum he was robbed of, he not being able to write or read, sent for one Mr. *John Brewster* to reckon up his money (from his written accounts or marks) and on such reckoning he found that he had been robbed of 82*l.* 12*s.* 9*d.* but that two days afterwards and before the notice in the *Gazette*, upon further recollection plaintiff discovered that he had been robbed of 2*l.* 16*s.* in one parcel and 1*l.* 10*s.* in another parcel, over and above the said 82*l.* 12*s.* 9*d.* which sums were likewise contained in the said three canvas bags. That it appeared further both from the examination of the plaintiff, and the evidence of the two constables of *Weeting*, that if notice on the night of the robbery had been given to them thereof in order to make immediate pursuit after the robbers, and it had been known the robbers had intended to pass the river (as the robbers who were on foot made their way toward *Hockwold* with *Wilton*, which village is so bounded by a river that it could not easily be got over but by a ferry) there was

was great probability that the robbers might have been taken that night.

That the plaintiff on the 24th of the same *February* published an account of the robbery in the *London Gazette* in the words and figures following: "Notice is hereby given pursuant to an act of parliament made in the 8th year of the reign of his present Majesty King *George* the second, intituled, An act for the amendment of the law relating to actions on the statute of *bue and cry*, That *John Witworth* of the parish of *West Wynch* in the county of *Norfolk* drover, on *Tuesday* the 13th day of this instant *February* 1759. about five of the clock in the afternoon of the same day on the King's highway leading from *Weeting* to *Metbwold* in the said county, between the 82d and 83d mile stones in the high road leading from *London* to *Lynn* in the hundred of *Grimscoe* in the parish of *Hockwold with Wilton*, or *Feltwell* (but the said *John* rather thinks it in the parish of *Feltwell*, being so lately informed) in the said county of *Norfolk*, was assaulted, wounded, stopped and robbed by two men on foot unknown to the said *John Witworth* in sailors dresses, one whereof was a tall lusty man of a fresh complexion, had a brown woollen cap or bonnet on, and a blue jacket; and the other a middle sized man of a dark complexion, wearing a small brimed hat and a blue jacket, who took from the said *John Witworth* 82l, 12s. 9d. in money, most part whereof was in guineas, the rest in *Portugal* pieces, some silver, and some halfpence, and three canvas bags or purses, in which was contained all the said money except some silver and halfpence, which were loose in his pocket, and also a silver watch, the maker's name *Clay, London*, to the best of the said *John Whitworth's* remembrance, number forgot, but the point of the hour hand was broken off, with a black ribband and the watch key, and then they made off towards *Hockwold with Wilton* afore said towards *London*, and by the description the said *John Whitworth* received afterwards by inquiring believes they went for *London*."

The plaintiff was examined, gave bond, and commenced his action within the time limited by law, and neither of the felons have since been apprehended.

The questions reserved for the consideration of the court are,

- 1st. Whether there was sufficient notice given of this robbery to enable plaintiff to maintain his action?
- 2^d. Whether the persons who committed the robbery, and the money and things of which the plaintiff was robbed, were sufficiently described in the *Gazette*?

This

This case was argued in this term by *Hewitt* the King's serjeant for the plaintiff, and serjeant *Foster* for the defendants.

1. It was insisted for the plaintiff, that considering the miserable situation he was in, after the robbery, he, with as much convenient speed as might be, gave notice of the robbery both to the inhabitants of a village near the place where the robbery was committed, and also to a constable of the hundred of *Grimshoe*, according to the statutes of 27 *Eliz. c. 13. f. 11.* and of the 8 *Geo. 2. c. 16. f. 1.* And to shew what notice was sufficient for plaintiff to ground his action upon, were cited 4 *Leon. 18, 19. pl. 63.* *Noy 155, 156. March 10 p. 28.* 2 *Sid. 45.* 1 *Show. 94.* And to shew what is a good notice within the *stat. 8 Geo. 2. c. 16.* cited 2 *Stra. 1170. 2dly.* It was argued for the plaintiff, that the felons, the time, place, and the goods and effects, were sufficiently described in the *Gazette.*

For the defendant it was insisted, that the whole sum whereof the defendant was robbed was not mentioned in the *Gazette*; and 2dly, that a very material description of one of the robbers whose eyebrows were sworn to be red (on the trial) was not taken notice of in the *Gazette*, which was much insisted upon by serjeant *Foster* as most material for the defendant; and of that opinion was the court, and gave judgment for the defendant.

Sandford versus Rogers, Esq; C. B.

THIS was an action upon the case upon promises. The defendant pleaded a recovery in *B. R.* in bar; the plaintiff replied *nul tiel record & hoc paratus est verificare, &c.* the defendant demurred, and shewed for special cause that the averment in the replication was ill.

Nul tiel record is replied to a plea of a recovery in B. R. and concludes with an averment, and good.

Poole for the defendant insisted that, when the plaintiff had replied *nul tiel record*, there was a compleat issue joined, and that it ought to have concluded with giving a day to the defendant to produce the record, and not with an averment, and this being shewn for cause of demurrer the replication is bad; and to prove this cited 1 *Barnes 240.* and *Cooke's Practice in C. B. 56.* as directly in point; and said that unnecessary prolixity in pleadings was to be discountenanced; that this was the same thing in effect as if a defendant was to plead the general issue, and conclude with an averment instead of going to the country.

Hewitt for the plaintiff. The law of pleading is to be determined by precedents, and therefore I have looked into the books of entries which must govern, or the rules of pleading will be at sea.

PART II.

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In *Lilly's Entries*, fo, 7, 182, 393, 404, 473, 498. the plea or replication of *nul tiel record* is concluded with an averment; so is 2 *Lutw.* 945. and the precedents are uniformly so, where the record pleaded is of another court; but where it is of a record of the same court, I do own there are some precedents where the conclusion is to the record, and not with an averment. 1 *Ld. Raym.* 550. *Cremor versus Wickett*, *Carthew* 517. S. C. and *vide Carth.* 517. *Dyer* 227, 228. 3 *Lev.* 243. 2 *Salk.* 566. *Moor versus the Bail of Garrett*. Hence it appears that the precedents are in favour of the conclusion with an averment when the record pleaded is of another court. *Nota*; The case in *Cooke's* book, does not say whether the record pleaded was of this, or another court; and in answer to 1 *Barnes* 240. he cited *Comyns* 533. *Newbury versus Strudwick*.

Poole in reply. Many precedents have been cited, which are certainly so, as my brother *Hewitt* has said; but surely there are an infinite number of precedents in the books which at this time would be held very ill, as in *trover* a variety of special pleas may be found, which now would be very bad, and held to amount to the general issue: What I rely upon is, that there was a compleat issue without any rejoinder.

The court (*absente* C. J.) were of opinion that the replication was very well, especially as this was a record of another court; and seemed to think that either way was well enough.

Judgment for the plaintiff.

Tindal versus Moore. C. B.

Words:

THIS was an action of slander, upon several sets of words spoke by the defendant of the plaintiff; verdict for the plaintiff upon the first and fifth sets of words, damages 40s. The first set were these; *That rogue Jo. Tindall* (meaning the plaintiff) *that set the house on fire*, (meaning the summer-house that was burnt in the occupation of one Mr. Cotton) *and if any body will give me charge of him, I will carry him to New Prison.*—The fifth set of words were these: *Jo. Tindall* (meaning the plaintiff) *set the house on fire*, (meaning the same house).

It was now moved in arrest of judgment that the latter set of words were not actionable, for that every count in a declaration is a substantive count, and the *innuendo* (meaning the same house) shall not relate to the summer-house mentioned in the first set of words.

Per curiam. Although the latter set of words be not of themselves actionable, yet they shall have relation to the former set; and we must take them to have been spoken *maliciously*, as the jury have found for the plaintiff.

Judgment for plaintiff. *Davy* for the defendant, *Nares* for the plaintiff.

Watts plaintiff Birkett deforcient. C. B.

THIS fine was set aside and vacated after it had passed all the offices and was compleated, because the conusor died before the return of the writ of covenant, as appeared to the court upon affidavits. *Per curiam*, The crown has a right to the *postfine* at the return of the writ of covenant, and not before, and the *postfine* is for licence to accord, and is the *King's silver*; the *presfine* is not the *King's silver*, so that as the King's silver became due and was paid after the death of the conusor, the fine is void; and therefore though it has passed through all the offices we will set it aside, and not put the parties to the trouble and expence of a writ of error. *Vide Barnes's Supplemt. 32. Barber versus Nunn.*

Conusor dies before the return of the writ of covenant.

2 Inst. 411, 517.

Dy. 246.

The post fine is the King's silver, and the presfine is not.

Holdfast *versus* Morris. C. B.

THIS was an action of trespass brought against the tenant in possession for the mesne profits (after a judgment against the casual ejector); for it was lately resolved by all the Judges, that this action lies for the mesne profits from the time the tenant in possession has notice of the lessor's title, though the tenant lets judgment go by default, and his name does not appear in the record of the judgment against the casual ejector

In an action for the mesne profits after a recovery in ejectment defendant shall not pay money into court

Now it was moved by serjeant *Hewitt* for the defendant for leave to pay a sum of money into court, who compared this action to an action on the case for the use and occupation, in which action money may be paid into court. *Sed per totam curiam*, This is trespass for a *tortious* occupation, but the action on the case is upon a *contract* either expressed or implied, and denied the motion; and it was said the like motion had been lately denied in *B. R.*

Easter

Easter Term

33 Geo. 2. 1760.

Bayley *versus* The University of Oxford. C. B.

A recovery suffered of an advowson in gross and one acre of land on a writ of Entry sur disseisin in le post, is good.

THE question in this case was, whether a *common recovery* suffered of an *advowson in gross*, and one acre of land on a writ of entry *sur disseisin in le post*, was good in point of law; upon searching for precedents, sixteen were found where recoveries of advowsons in gross, and a little land had been suffered upon writs of *entry sur disseisin in le post*, and no case was to be found where such a recovery was ever held bad; and *Dormer's* case is in point. And the court refused to hear any argument against this recovery; and said, that if this was *res integra*, it might not be right (perhaps,) yet *quod fieri non debuit factum valet*. And the court gave judgment for the plaintiff, *viz.* that the recovery was good, without argument.

Cooper *versus* Sherbrooke, Vsq; in replevin. C. B.

5/3e @ 284

Nonsuit in replevin, avowant executed a writ of inquiry after a writ of second deliverance, and good.

THIS was judgment of nonsuit for want of a declaration, and a writ *de retorno habendo* was awarded the 12th of July 1759. On the 2d of October following the plaintiff sued out a writ of second deliverance, and afterwards the avowant executed a writ of inquiry of damages; and now it was moved by *Hewitt* and *Davy* serjeants for the plaintiff, that the writ of inquiry was superseded by the suing out the writ of second deliverance; but upon shewing cause, it was answered by *Whitaker* and *Nares*, serjeants for the avowant, that although a writ *de retorno habendo* was awarded (which is the common course in the case of a judgment of nonsuit in replevin,) yet by the *stat. 17 Car. 2. c. 7.* the avowant had his election to sue out a writ of inquiry of damages to recover against plaintiff the arrearages of rent, and that although a writ of second deliverance is a *superfedeas* to the writ *de retorno habendo*, yet it is not a *superfedeas* to the writ of inquiry, agreeable to the note in *Palm. 403.* and of that opinion was the whole court, and discharged the rule to shew cause why the writ of inquiry and the inquisition taken thereon should not be superseded.

And

And *Batburst* Justice said, that by the *stat. 17 Car. 2.* the legislature intended that the proceeding upon that statute by *writ of inquiry fieri facias*, and *elegit*, should be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithstanding the course of awarding a writ *de retorno habendo*, which is a right judgment; for the statute hath not altered the judgment at common law, but only gives a farther remedy to the avowant. *Vide Carth. 253. Baker v. Lade, 1 Salk. 95. Latch 72. and F. N. B. 156. margine. Quare*, Whether the writ of second deliverance in this case is not taken away by the statute?

Lowfield *versus* Jackson. C. B.

THE plaintiff declared in covenant of last term; the defendant obtained a Judge's order for three weeks time to plead, and on the first of *March* last obtained another order for one week's further time upon pleading issuably and taking short notice of trial for the then next assises if necessary; the defendant pleaded a recovery in another court, whereupon the plaintiff signed judgment; and now it was moved to set aside the judgment by serjeant *Davy* who insisted that the defendant had complied with the terms of the Judge's order, and that this was an issuable plea. But *per curiam*, Although this be an issuable plea within the letter of the Judge's order (yet it is not such within the true intent and meaning of it, which was to speed the plaintiff in the trial of his cause by the country), and although we will set aside the judgment, and the plaintiff shall reply *nul tiel record*, yet if it be not produced within the proper time there shall be judgment for the plaintiff, and the defendant shall be bound to take short notice of executing a writ of inquiry within the present term. *Hewitt* serjeant for the plaintiff, *Wednesday 30th April*, being the 8th day in term.

Practice.
As to being bound to plead issuably by an order of a judge.

Atkinson *versus* Taylor. C. B.

IT was moved to set aside a *capias ad respondendum*, because there was not 15 days between the *teste* and return thereof; to this it was answered, that it is error, (if any thing) and not an irregularity; to prove which was cited 1 *Barnes 295. Williams versus Faulkner*. But *per curiam*, This case was over-ruled, and the *capias* set aside, but without costs.

Practice.
There must be 15 days between the teste and return of a capias ad respondendum.

Reppington executor *versus* the Guardians and Governors of Tamworth School.

Declaration in
quare impedit
amended.

IN *quare impedit* of a donative vicarage, the defendant cravedoyer of the original writ, which he set forth in his plea, and shewed a variance between the writ and the count; and now it was moved for leave to amend the declaration, which was granted on payment of costs, and the defendant is to plead *de novo*. *Hewitt* for plaintiff, *Poole* for defendant.

Robins widow *versus* Crutchley and his wife and another in dower

Entred among the pleas of land of this term. Roll 44

Declaration in
dower.

Staffordshire, **A**NN Robins widow, who was the wife of *John Robins*, Esq; deceased, by *Thomas Vaughan* her attorney, demandeth against *Brooke Crutchley*, *Catharine* his wife, and *Jane Robins* spinster, the third part of thirty messuages, fifty barns, fifty stables, thirty orchards, thirty gardens, three hundred acres of land, two hundred acres of meadow and three hundred acres of pasture and common of pasture with the appurtenances in *Bilston*, *Wolverhampton* and *Willen-hall* in the said county of *Stafford*, and also the third part of nine coal mines in *Bilston*, *Wolverhampton* and *Willen-hall* aforesaid, as her dower of the endowment of the said *John Robins* heretofore her husband, by writ of our Lord the King of dower whereof she hath nothing, &c.

Plea.

1st, Ne un-
ques accouple.

2d Plea ne
unques seisie
que dower.

And the said *Erooke*, *Catharine* his wife and *Jane* by *Robert Par-doe* their attorney come and say, that the said *Ann* ought to have her dower in this behalf, as having been the wife of the said *John Robins* deceased, because they say that the said *Ann* never was ac-coupled to the said *John Robins* deceased, in lawful matrimony; and this the said *Brooke*, *Catharine* and *Jane* are ready to verify; where-fore they pray judgment if the said *Ann* ought to have her dower of the tenements, common of pasture and mines aforesaid; and the said *Brooke*, *Catharine* his wife and *Jane* for further plea in bar by leave of the court here for this purpose first had and obtained, ac-cording to the form of the statute in such case lately made and pro-vided, say, that the said *Ann* ought not to have her dower of the tenements common of pasture and mines aforesaid, with the ap-purtenances, of the endowment of the said *John Robins* deceased, because they say that the said *John Robins* deceased, neither on the day

day on which he is above supposed to have espoused the said *Ann* nor at any time afterwards, was seised of the tenements, common of pasture and mines aforesaid, with the appurtenances, whereof, &c. of such estate whereby he could thereof endow the said *Ann*; and of this they put themselves upon the country.

And the said *Ann* saith that as to the said plea of the said *Brooke*, *Catharine* his wife and *Jane* by them first above pleaded in bar, she the said *Ann*, by reason of any thing in that plea above alledged ought not to be barred from having her dower aforesaid, as not having been the wife of the said *John Robins*, because she saith that heretofore, to wit, on the twelfth day of *February* in the year of our Lord 1754. in the court Christian held at *Litchfield* in the county of *Stafford*, before the worshipful *Richard Smalbrooke*, doctor of laws, official principal of the right reverend father in God *Frederick* by divine permission Lord bishop of *Litchfield* and *Coventry*, one *Sir William Wolfeley*, Bart, did implead the said *Ann* in a cause of divorce by reason of adultery, and did then and there in the said court Christian exhibit a libel against the said *Ann*, thereby charging and alledging that the said *Ann* was the wife of him the said *Sir William Wolfeley*, and thereby also charging and alledging that she the said *Ann* had committed adultery with the said *John Robins* after she was the wife of him the said *Sir William Wolfeley*, and the said *Sir William Wolfeley* did by his said libel, amongst other things, pray that the said *Ann* might be divorced from him as his wife from bed and board and mutual cohabitation, by reason of adultery with him the said *John Robins*; to which said libel she the said *Ann* did plead in bar, that she was the lawful wife of him the said *John Robins*, and not the wife of the said *Sir William Wolfeley*, and that she was lawfully married to him the said *John Robins* according to the rites and ceremonies of the church of *England* on the 16th day of *June* 1752. in the parish church of *Castle* in the county of *Stafford*, and by her said plea in bar did pray, amongst other things, that she might be decreed and pronounced to be the lawful wife of him the said *John Robins*, and to have been lawfully married to him on the said 16th day of *June* 1752. and such proceedings were had upon the said libel and plea in bar; that afterwards and before any definitive sentence was pronounced in the said court Christian of the said bishop of *Litchfield* and *Coventry*, to wit, on the 24th day of *June* in the year of our Lord 1754. the said cause was removed into the Arches court of *Canterbury* before *Sir George Lee*, Knt. doctor of laws, official principal of the said court of Arches, by proper and legal process which issued out of the said court of Arches for that purpose upon the appeal, and at the instance of her the said *Ann*, but before any definitive sentence or judgment was given or pronounced in the said cause by the said court of Arches, to wit, on the 31st day of *December* in the year of our Lord 1754. he the said

Replication
sets forth a
decree in the
court of
Arches, that
the deman-
dant was the
wife and is
the widow of
John Robins

John Robins died, to wit, at *Stafford* in the county aforesaid; and afterwards, to wit, on the first day of *December* in the year of our Lord 1757. the said cause came on to be heard, and the question put in issue by the said plea, whether she the said *Ann* had been the lawful wife and was then the widow of him the said *John Robins*, came on to be determined by the said court of Arches; and the said Sir *George Lee*, judge of the said court, did on the first day of *December* in the year of our Lord 1757. upon full evidence and hearing of advocates and proctors on both sides, by his interlocutory decree having the form of a definitive sentence, pronounce, decree and declare, that she the said *Ann* had been the wife, and then was the widow of him the said *John Robins*, and was lawfully married to him on the 16th day of *June* 1752. to wit, at the parish church of *Castle* in the said county of *Stafford*, which said sentence is in full force and effect, not reversed, vacated or otherwise annulled, as by the said proceedings and sentence remaining in the said court of Arches at *Doctors Commons* in the city of *London* may more fully and at large appear; and the said *Ann* doth aver that the said court of Arches had full jurisdiction of the said cause, and that the said sentence was fairly and justly obtained upon full evidence, and upon hearing of advocates and proctors on both sides; and the said *Ann* doth aver that *Ann Robins*, mentioned in the said libel so exhibited by the said Sir *William Wolsley* against the said *Ann* as aforesaid, and the said *Ann*, the now demandant in this action, are one and the same person, and not different persons; and that the said *John Robins*, mentioned in the said libel, and also named in the said sentence of the said court of Arches, and the said *John Robins*, the husband of the said *Ann* in the said declaration mentioned, is one and the same person, and not different persons; and this the said *Ann* is ready to verify; and therefore prays judgment for her dower aforesaid, and if the said sentence can be gainsaid; and whether the said *Brooke*, *Catharine* his wife and *Jane* are not estopped by the said sentence to say that she the said *Ann* was never accoupled to the said *John Robins* in lawful matrimony; and as to the said plea of the said *Brooke*, *Catharine* his wife and *Jane* by them secondly above pleaded in bar, whereof they put themselves upon the country, she the said *Ann* doth so likewise.

Demurrer.

And the said *Brooke*, *Catharine* his wife and *Jane*, as to the said plea of the said *Ann* above in reply pleaded to the said plea of the said *Brooke*, *Catharine* his wife and *Jane* by them first above pleaded in bar, say, that the said plea in manner and form as the same is above pleaded by way of reply, and the matters therein contained, are not sufficient in law for the said *Ann* to have her dower of the tenements, common of pasture and mines aforesaid in this behalf, as having been the wife of the said *John Robins* deceased, to which plea in manner and form aforesaid above pleaded by way of reply they
the

the said *Brooke, Catharine* his wife and *Jane* need not, nor are they obliged by the law of the land to answer thereto; and this they are ready to verify; wherefore for want of a sufficient replication in this behalf the said *Brooke, Catharine* his wife and *Jane*, as before, pray judgment if the said *Ann* ought to have her dower of the tenements, common of pasture and mines aforesaid.

And the said *Ann*, since that she hath above by replying to the plea of the said *Brooke, Catharine* his wife and *Jane* first above pleaded alledged sufficient matter in law to have her dower aforesaid, as having been the wife of the said *John Robins*, which said matter she is ready to verify, and which said replication and the matter therein contained, the said *Brooke, Catharine* his wife and *Jane* have not denied, nor in any wise answered thereto, but the verification thereof to admit do wholly refuse, prays judgment for her dower aforesaid to be adjudged to her, &c. And because the justices here will advise amongst themselves of and upon the premises, whereon the said parties have put themselves upon the judgment of the court before they give their judgment thereon, day is given unto the said parties here until the morrow of the Ascension of our Lord, to hear their judgment of and concerning the said premises, for that the said justices here are not yet advised thereof, &c. And as to the trying of the said issue above joined between the said parties to be tried by the country, the sheriff is commanded to cause to come here on the same day twelve, &c. by whom, &c. and who neither &c. to recognizance, &c. because as well, &c. At which day here come as well the said *Ann Robins* by her attorney aforesaid as the said *Brooke, Catharine* his wife and *Jane* by their said attorney, and the sheriff did nothing upon the said writ, nor did he send back the same: And because the justices here will further advise amongst themselves of and concerning the premises whereon the said parties have put themselves upon the judgment of the court before they give their judgment thereon, further day is therefore given to the parties aforesaid here until on the octave of the holy *Trinity*, to hear their judgment of and concerning the premises, for that the said justices here are not yet advised thereof, &c. And as to trying the issue aforesaid above joined between the parties aforesaid to be tried by the country, the sheriff, as before, is commanded that he cause to come here on the same day twelve, &c. to recognize in form as aforesaid; at which day here come as well the said *Ann* by her attorney aforesaid, as the said *Brooke, Catharine* his wife and *Jane* by their said attorney, and the sheriff did nothing upon the last mentioned writ, nor did he send back the same; whereupon the premises aforesaid whereon the parties aforesaid have put themselves on the judgment of the court here having been seen, and by the justices here fully understood, and mature deliberation being thereupon had, for that it appears to the justices here that the said

Joinder in demurrer.

Curia advisare vult on the demurrer.

Award of a venire facias to try the issue to the country.

Vicecomes non misit breve.

Uterius concilium on the demurrer.

Alias ve. fa. awarded.

Judgment for the defendant on the demurrer.

no respect
being had to
the issue to
the country.

plea of the said *Ann Robins* above in reply pleaded to the plea of the said *Brooke*, *Catharine* his wife and *Jane*, by them first above pleaded in bar, and the matters therein contained, are not sufficient in law for the said *Ann* to have her dower of the tenements, common of pasture and mines aforesaid; therefore no respect being had to the issue aforesaid above joined between the parties aforesaid to be tried by the country, it is considered that the aforesaid *Ann Robbins* take nothing by her writ aforesaid, but be in mercy for her false claim thereof; and that the aforesaid *Brooke*, *Catharine* his wife and *Jane*, do recover against the said *Ann* twenty-two pounds two shillings and three pence, for their costs and charges by them about their defence in this behalf sustained, to the said *Brooke*, *Catharine* his wife and *Jane*, by the court of our said Lord the King now here with their assent, according to the form of the statute in such case made and provided, adjudged, and that the said *Brooke*, *Catharine* his wife and *Jane*, have thereof execution.

Robins widow *versus* Crutchley and his wife and another. C. B.

Dower.
Marriagemust
be tried by the
bishop's cer-
tificate.

DOWER of lands in the county of *Stafford*; the defendants plead two pleas; 1st, *Ne unque accouple in loyal matrimonie & hoc, &c.* 2dly, *Ne unque seisie & de hoc pon' se super patriam*; the plaintiff replies to the first plea that she ought not to be barred of dower, because she says that on the 12 Feb. 1754. Sir *William Wolseley* exhibited a libel in the spiritual court of *Litchfield* and *Coventry* against her as being his wife, charging therein that she had committed adultery with *John Robbins*, and prayed a divorce from her *a mensâ & thoro*, to which libel she pleaded that she was the wife of *John Robbins* and not of Sir *William Wolseley*, and was lawfully married to *Robins* the 16th of *June* 1752. and prayed that she might be decreed to be the wife of *Robins*; and before any definitive sentence in the court of *Litchfield* and *Coventry*, viz. the 24th of *June* 1754. the cause was removed into the court of *Arches* upon the appeal of the said *Ann*, but before any definitive sentence in the court of *Arches*, viz. the 31st of *December* 1754. the said *John Robbins* died; and afterwards on the 1st of *December* 1757. the cause was heard in the court of *Arches*, and upon full evidence and hearing advocates and proctors on both sides, the court decreed that the said *Ann* had been the wife, and then was the widow of the said *John Robbins*, and was lawfully married to him on the 16th of *June* 1752. which sentence is in full force; and the said *Ann* avers that the said court of *Arches* had full jurisdiction of the cause, and that the sentence was fairly and justly obtained upon full evidence, &c. and she further avers that *Ann Robbins* in the libel mentioned, and *Ann* the now demandant, are one and the same person,

son, and that *John Robins* mentioned in the libel and sentence aforesaid, and *John Robins*, the husband of the said *Ann* in the declaration mentioned, is one and the same person; and this she is ready to verify; and therefore prays judgment for her dower, and if the said sentence can be gain said, and whether the defendants are not estopped by the sentence to say that she was never accoupled to the said *John Robins* in lawful matrimony; and as to the second plea of *ne unque seisse*, she the plaintiff joins issue to the country.

The defendants demur to the replication of plaintiff to the plea of *ne unque accouple*, and the plaintiff joins in demurrer.

This case upon the demurrer was argued in this present term by serjeant *Hewitt* for the demandant, and serjeant *Nares* for the tenants.

It was insisted for the demandant that the sentence pronounced in the court of Arches (touching the marriage of the demandant with *John Robins*) having a competent jurisdiction of that matter, was an absolute bar to, and concluded all persons whatsoever to say they were not lawfully married, until the same should be reversed, and notwithstanding that *Robins* was not party to the suit in the spiritual court; and to prove that this was the law, cited 4 Rep. 29. *Bunting's case*; which was thus: *J. Bunting* and *Agnes Adingshall* contracted matrimony *per verba de presenti*, and afterwards 1 December 1555, *Agnes* took to husband *Thomas Twede*, and afterwards 9th July 1556. *John Bunting* libelled against *Agnes* upon the said contract (without naming her husband *Thomas Twede*) for a divorce, upon a pre-contract between the said *J. Bunting* and *Agnes*, whereupon decretum fuit quod prædicta *Agnes* subire matrimonium cum præfato *J. Bunting* et insuper pronunciatum decretum et declaratum fuit dictum matrimonium fore nullum, &c. And further it was decreed that the said *John* and *Agnes* should intermarry, which they did, and had issue the plaintiff, (the said *Thomas Twede* then living). And it was adjudged that although *Twede*, then being, *de facto*, the husband of the said *Agnes*, was not party to the said suit, nor to the sentence in the spiritual court which dissolved the marriage between him and the said *Agnes*, but the said *Agnes* only; yet the sentence against the wife only, being but declaratory, was good, and should bind the husband *de facto*; and forasmuch as the consueance of the right of marriage belongs to the spiritual court, and they have given sentence in this case, the judges of the common law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences as consonant to the law of holy church, for *cuiuslibet in sua arte perito est credendum*; and so it was adjudged that the plaintiff *Bunting* was legitimate.

In assize the tenant pleaded bastardy in the plaintiff, and he estopped him by reason that he was at another time certified *Mulier* by the bishop in a replevin between a stranger and the bailiff of the plaintiff, who acknowledged the taking in right of the plaintiff, in which the bailiff had aid of the now plaintiff, and there was certified *Mulier*; judgment, &c. and a good estoppel, as was adjudged there. *Bro. Estoppel*, pl. 78. And many other cases were cited to prove that sentences in the spiritual court were binding. 2 *Salk.* 437. 3 *Mod.* 164. 1 *Salk.* 290. *Carth.* 225. 2 *Stra.* 960, 961. 6 *Mod.* 155. 2 *Lev.* 15. and *Hatfield and Hatfield*, cited in 2 *Stra.* 961.

Serjeant *Nares* for the defendants admitted that a sentence in the spiritual court in a cause of marriage was conclusive evidence, generally speaking; but insisted that matter of evidence cannot be pleaded but only matter of fact; that the law, in this particular case, knows of no other trial of the legality of a marriage besides the bishop's certificate, and there is no precedent of such a replication as this, which attempts to draw the trial *ad aliud examen*. It has been urged that the defendants are concluded or estopped by this sentence, but this is no record, the whole of it may be by collusion, is still liable to be reversed by a third person any ways interested, who was no party to the cause even after the conclusion of the cause. *Vide Oughton. Ordo Judic.* 28. tit. 14. *quod Tertius potest intervenire pro interesse suo*; decrees in ecclesiastical courts are not (even there) considered as conclusive, as appears by the same book, fol. 306. s. 3 & 4. *In causa matrimoniali non obstat exceptio rei adjudicatæ, vel quod sententia transit in rem judicatam; quia sententia lata, in causa matrimoniali, contra matrimonium nunquam transit in rem judicatam. Et quoties ecclesia decipitur pronunciando sententiam contra matrimonium, ex novis probationibus (etiam aliquando ex eisdem) potest revocari prior sententia*; so that Sir *William Wolfley* may still controvert the marriage, and the spiritual court may hereafter reverse their sentence for any thing the court here knows. And *vide Bracton* 304.

In breaking the case upon this first argument *Willes C.* Justice said, That at first he thought this a very plain case for the defendants, but that now he found there were different opinions about it; however if 10000 great mens opinions were against the known law of the land, he should pay no regard to them; that he should never be for setting up the spiritual courts above the temporal courts, that no determination in the high courts touching lands shall bind strangers, much less ought a sentence in the spiritual court, (to which Mr. *Robins* was no party), to bind his heirs; that this sentence was nothing like an estoppel; evidence it may be, but nothing else; if upon an issue joined, *married or not married*, the bishop had certified to us that they were married, there could be no doubt but the bishop's certificate must prevail.

Clive

Clive J. There can be no other trial in this case but the bishop's certificate, and no method of pleading whatever can oust the bishop of his certificate. *Robins* was no party to the suit, and why his heirs should be concluded by the sentence, I cannot conceive; it is mere matter of evidence, which I never thought could be pleaded; this is a replication of evidence, and therefore I think it is bad.

Batburst Justice. The cases cited by brother *Hewitt* for the demandant prove nothing more than that the courts of law receive a sentence as conclusive evidence; but the bishop hath an exclusive right, and nothing but his certificate can try this matter; whether the bishop can certify contrary to a sentence we cannot say, for we are not competent judges of that matter; the case in *Bracton* makes me think we must send to the bishop, and whether he is bound by the sentence he knows best.

Noel Justice of the same opinion; but as counsel were retained to take notes for a second argument, and demandant desired it might be debated again, the court deferred giving judgment, and ordered an *ulterius concilium*. *Post* 127.

Roe on the demise of Newman *versus* Newman. C. B.

IN ejectment; upon a case stated for the opinion of the court, it appeared that the place in question was part of the waste ground of the manor of *Teddington* in the county of *Middlesex*, and that the custom of the manor is, that copyhold lands shall descend to the youngest son, or youngest brother, and that the lord of the manor in the year 1722. granted the place in question to an ancestor of the lessor of the plaintiff, (who claims as heir in *Borough English*) to hold according to the custom, &c. but the case does not state this material fact, *viz.* that it has time out of mind been demiseable by copy of court roll. Upon arguing this case the court were all clear of opinion, that what was stated was only evidence; and if it had been stated that it was demiseable by the lord *ad voluntatem domini secundum consuetudinem manerii tempore E. 3.* and that it had been granted by copy of court roll ever since, it would not have been sufficient, for it must be stated, or found, or pleaded to be demiseable by copy of court roll time out of mind, or it will not be adjudged copyhold; therefore as the court cannot say that this is copyhold, the plaintiff has no title, and there must be

Copyhold must be pleaded to be such time out of mind, and cannot be created in time of memory.

Judgment for the defendant.

Trinity Term

33 & 34 Geo. 2. 1760.

Hulland *versus* Malken and Bristow. C.B.

Debt on bond to indemnify the plaintiff from charges of a bastard child.
Plea that the mother took the child away.
Replication that it has since been chargeable to the parish, and plaintiff has been obliged to pay.

DE B T upon a bond; defendants craved *oyer* of the condition, which was, that if they should indemnify plaintiff &c. as to a bastard child, then the obligation to be void, otherwise, &c. And then plead that the child is an infant in the arms of it's mother, and that defendants while the child and mother was with them (which was four days) took care of it and provided for it every thing, but that the mother hath taken away the child from defendants, and that the child hath not since been delivered to them by plaintiff, *et hoc*, &c. The plaintiff replies, that it is true that the child was carried away by the mother, who for some time provided for it, but for replication says, that it afterwards became chargeable to the parish, and that the plaintiff has been obliged to pay such charges to the parish, whereby he is damaged; *et hoc*, &c. Defendant's rejoinder, insists that the child was an infant under seven years of age, and in the keeping of the mother, and that it was not in their power to take it from her and keep it, so as to indemnify plaintiff; to this the plaintiff demurred, and shewed for cause that the rejoinder is argumentative neither confesses and avoids, or traverses or denies, and is also a *departure* from the plea.

The case was this; *Ann Parker* having charged the plaintiff with being the father of a bastard child, he was obliged to give bond to indemnify the parish; but in order to get rid of the child, and to be clear of the parish, he paid the defendants 14*l.* in consideration whereof they entred into the said bond to indemnify the plaintiff against all damages, charges, &c. which he might be liable and put to on account of the said child.

Upon arguing this case the whole court were clearly of opinion that the plea was bad; they said this was a general bond to indemnify the plaintiff, as to the child, against all the world; and they can

can plead nothing but one of these two things, either that plaintiff hath not been damnified, or (in excuse) if he has been damnified, he himself was the occasion thereof, neither of which they have done; the mother's taking away the child is no excuse at all. Moreover they said, the replication had shewn how plaintiff was damnified; and the rejoinder in effect had admitted it, because it had not denied it; and they said, we need not in this case say whether the father or the mother hath a right to have the child while under seven years of age, because the defendants have bound themselves to keep the plaintiff harmless against all the world; they have confessed in their plea that they had the child in their keeping, and why did they let the mother carry it away; it was the defendants own fault, and cannot excuse them to the plaintiff. Judgment for plaintiff.

N. B. The Ch. Justice said he would give no opinion whether the father has any power over the child, who is *nullius filius*; *Grotius* says, truly the mother is the only certain parent; and an order of justices to remove the mother always removes the child.

Biscoe, Esq; *versus* Kennedy and his wife C. B.

IN debt upon a bond entered into by the wife *dum sola* the husband is gone abroad and *outlawed*, and the wife although she appears publicly is *waived*; and now it was moved to set aside the outlawry against the wife, and to restore her the goods taken upon the *capias utlagatum* which are sworn to be her separate goods; but *per curiam*, We must take the goods to be the husband's in point of law, and if she has any equitable right to them, she must go to a court of equity. As she appears publicly, she has been wrongfully outlawed, therefore let the rule be absolute for setting aside the outlawry against the wife, and be discharged as to the restoring the goods. *Davy* for plaintiff, *Hewitt* for defendant.

Debt upon a bond by the wife *dum sola*, she and her husband outlawed, and her separate goods taken in execution.

Robins *versus* Crutchley and others. C. B. Ante 125.

THIS case was again argued this term by serjeant *Stanniford* for the demandant, and serjeant, *Poole* for the tenants; what was urged for the demandant, was, in substance very much the same, with what was said upon the former argument; for the tenants it was now said that *ne unques accouple, &c.* was the general issue, to which no new matter can be replied; and this was principally relied upon by *Poole*, that there must be such a replication as will join the issue, and the awarding the writ to the bishop is joining the issue. *Nul tiel record* is a general issue although it concludes with an

Bishop's certificate the only trial of marriage in dower.

an averment (like this), if it could be tried by the country it must have concluded to the country. But I do admit that in case where the bishop has already certified, such certificate may be replied; for to award a second writ to the bishop, would be to try the matter twice. *J. and M.* his wife brought a writ of account against *W.* who pleaded that *M.* was a nun professed in the order of minors in *London*, and prayed judgment, &c, plaintiffs replied that at another time they the said *J. and M.* brought a writ of entry against one *B.* who alledged that *M.* was professed, whereupon a writ issued to the bishop of *London*, who certified that she was not a nun professed, and shewed an exemplification of this record, and prayed judgment if the defendant shall not be estopped to say that *M.* is professed. The defendant said they were strangers to that record; but the court said, we cannot send to the bishop to certify to us that which already hath been done, and appears to us upon record, which is conclusive against all. And the court gave judgment for the plaintiff, that the defendant should account. *Fitz. Abr. tit. Estoppel, pl. 282.* This shews that the bishop's certificate is the only trial. *W. C. and M.* his wife brought dower; the tenant pleaded that the wife having married *A.* and while he was living married *B.* of whose endowment she now demands, and that *A.* is still living; but the court would not allow this manner of pleading, which was an attempt to oust the bishop of his certificate, and to draw it to the country, so the tenant was obliged to plead *ne unques accouple, &c.* and a writ was awarded to the bishop. *Bro. Dower 54.* Many more cases were cited on both sides, which upon giving judgment were laid quite out of the case.

Ld. Ch. Justice Willes. I am of opinion that there can be no replication to a general issue to oust a person of his legal trial; here the bishop has the only right of trial by his certificate to this court, and if this replication be allowed the bishop will be ousted; a sentence in the spiritual court is not a record, and if it comes in question here must be tried by the country: neither is it final to the parties, for (as *Oughton* says rightly) they may at any time apply to have it reversed; but the bishop's certificate is conclusive and final to all intents.

Clive Justice. There never was a precedent of such a replication as this; I think *ne unques accouple in loyal matrimonie* is a general issue, and such a replication as this cannot be allowed, for it endeavours to draw the trial to the country, which the law doth not permit. I admit that sentences by proper courts having competent jurisdiction are conclusive evidence to every body, but it is well known you cannot plead evidence; this is like *nul tiel record*, which is a general issue although it concludes with an averment; to which you can reply nothing but *habetur tale de recordum*. I think the sentence

is nothing but evidence, which may be proper to be laid before the bishop; and that the tenant must have judgment.

Bathurst Justice. I am of opinion with my Lord and my brother, that judgment must be for the tenant in this case; but I think that although this plea hath been said to be a general issue, yet there may be some cases where a special replication to it must be allowed; in an assize the tenant pleaded bastardy in the plaintiff, who by replication estopped him because he was before certified legitimate by the bishop in a *replevin* between a stranger and the bailiff of the plaintiff, who acknowledged the taking in right of the plaintiff, in which the bailiff had aid of the then plaintiff, and there he was certified *Mulier*, judgment that this was a good *estoppel*. *Bro Estoppel* 78. *Sed nota*, * that replication did not draw the matter to be tried by any other than the bishop, but only insisted, that the fact had already been legally tried and determined that the plaintiff was legitimate; so in the present case, the demandant might have replied that the bishop had formerly certified to this court that she was married to *Robins*, (if she could shew any record of such a certificate), which would be an estoppel to all mankind to say she was not married to *Robins*. But a sentence in the spiritual court is not final, even in that court; and shall this court be bound by a sentence which the spiritual court themselves are not bound by? • By the reporter.

Nel Justice. I am of the same opinion for the tenant; this is a new device to alter the legal trial in this case, and neither side have been able to shew any precedent like the present replication.

Judgments for the tenants.

Nota; There are three cases of trial at law by the bishop's certificate, and which cannot be tried by the country, *viz.* Marriage, bastardy, and profession of some order of religious.

Roe on the demise of Parry *versus* Hodgson. C. B.

IN ejectment; upon a case stated for the opinion of the court the principal question was, whether a lease for 21 years made by the testamentary guardians of an infant Mr. *Spencer* to *Parry* was absolutely void, or only voidable; it appeared upon the state of this case that Mr. *Spencer* himself has done no one act since he came of age, either towards establishing the lease, (supposing it voidable) or to avoid it; upon the first argument the court agreed in one point, *viz.* that a testamentary guardian by statute till an infant was 21 years of age, and a guardian in socage till an infant was 14, were the same; and therefore whatever interest the latter had in lands till

Whether a lease for 21 years made by a testamentary guardian of an infant be void, or only voidable.

PART II. L 1 the

infra 135.

the infant was 14, the guardian by statute has the same until he is 21. *The Duke of Beaufort against Eerty*, 1 Wms. Rep. 703, 4. But as to the main question, whether the lease was void or only voidable, they all (except Noel justice) doubted much, and gave no opinion; the Ch. Justice seemed inclined to think the lease was void, from what he said. *Clive* Justice, said he was far from saying it was either void or voidable; *Bathurst* Justice, gave no opinion, but from what he said he seemed to think that, whether the lease was void or not at first, it certainly became void or at an end when Mr. *Spencer* came of age, so could not now be a subsisting lease to give lessor of plaintiff title. *Noel* Justice, was of opinion that the lease was a good lease, and only avoidable by the infant when he came of age, and that he might then affirm it if he thought fit, but said that he should be very willing and ready to depart from this opinion, if he should find he had come into it too readily. *Uterius concilium*.

2 Q B 580

Knipe *versus* Palmer. C. B.

4 B & C 261

Covenant upon a lease made by the committee of a lunatic, by plaintiff as the committee, will not lie, for a committee cannot make such case at law.

ACTION of covenant brought by the plaintiff as committee of one *John Wright* a lunatic, upon covenants in a lease made by the plaintiff as committee in his own name, and assigns several breaches; the defendant pleads *nil habuit in tenementis*; the plaintiff replies the commission of lunacy and proceedings thereupon, demurrer and rejoinder.

Serjeant *Poole* for the defendant, insisted that even the King himself, by his prerogative, cannot take the profits of a lunatic's estate to his own use, as was resolved in *Frances's* case, *Moor* 4. Where it was found by office that *William Frances* was a lunatic, wherefore the King seized his lands and his body; and the custody of his person and his lands was committed to one *Holmes* for so long time as he should be a lunatic, to take the profits to his own use, rendering rent, &c. And in trespass *Holmes* prayed the aid of the King, *et non allocatur*, because the patent is void, for the King cannot grant the lands of a lunatic to another to take the profits to his own use, because the King himself is not intitled to them, otherwise than to support the person of the lunatic, his issue, wife, and family, and to give the surpluse to the lunatic when he recovers his memory; but otherwise it is of an idiot, for the King there shall have the profits to his own use, making allowance to the idiot for his keeping. From hence it is clear a committee of a lunatic cannot make a lease of the lunatic's estate; and so is 1 *Vern.* 262. *Foster v. Merchant*. And in *Blewit's* case, *Ley* 47. it was resolved by Lord *Hobart*, and Baron *Tanfield*, that the committees of a lunatic cannot grant any copyhold estate, for that they themselves by law have no estate in the

the manor of the lunatic, nor are Lords thereof for the time being, but that the lunatic by his steward may grant copyhold estates. And in *Hutt* 16. *Drury v. Finch*, the opinion of the court was, that the committee of a lunatic was but as a bailiff, and hath no interest, but for the profit and benefit of the lunatic, and is as his servant; and it is contrary to the nature of the committee's authority to have an action in his own name, for the interest, and estate, and all power of suits, is remaining in the lunatic. And it was ruled that a lunatic shall have a *quare impedit* in his own name, *vide Beverlie's case*, 4 *Rep.* see also *Cox v. Dawson*, *Noy* 27. to the like purpose; from these authorities the serjeant, in the outset, concluded that the lease was void as the plaintiff had nothing in the land, so that the plea of *nil habuit in tenementis* was a good plea.

Serjeant *Hewitt* for the plaintiff, argued that the King by the statute of *Prærog. Regis*, 17 *Ed. 2. cap. 10.* has a right to take care of the lunatic's lands, and consequently must have an authority, or interest, or both, so that something may be made of them for the benefit of the lunatic, by leasing the same to tenants; otherwise the lands may lie uncultivated, for in some countries, by the custom, no man will farm lands for less than three years, and *there*, if the lunatic or the committee cannot let for three years, it would be a detriment to the lunatic. He said the case in 1 *Vern.* 262. is only a *dictum* there; but it proves that a committee may make a lease by order of the court of Chancery, that is to say, the King himself may do it by the mouth of his Chancellor. The defendant has taken and accepted a lease from the plaintiff, and has held the land two years; it is unjust in him to say to the plaintiff, "I own I have held the land, but you had no power to demise." Justice is therefore with us, so the court will go as far as they can to give it us. He insisted that the committee had power to let, but that it was at his own peril if he does it without an order of the court of Chancery, or underlets.

Lord Ch. Justice *Willes*. The course of the court of Chancery is, to refer it to a Master to consider and report whether it will be for the benefit of the lunatic to make a lease? if it be, the court will order that the committee shall make a lease.

Serjeant *Hewitt* proceeded to make a second point; and insisted that as this is an action of covenant founded in contract, the action well lies whether the plaintiff had any thing in the land or not, and that it may be good as a contract, although the lease be bad; and cited *Owen* 136. 3 *Bull.* 154, 158.

Willes C. Justice. But brother! that was a covenant which was collateral to the land; and all the covenants in the case at bar, are

are such as run along with the land, and so those cases are not to the point in question.

Hewitt then insisted, that although this was not a lease, yet it ought to operate as a licence to defendant to enjoy, and that the defendant having enjoyed under this licence, the covenants may operate thereupon; and cited 2 *Salk.* 588. 2 *Keb.* 8. *Hob.* 53. 2 *Vent.* 99. 1 *Salk.* 199. And that this is a bad plea in covenant.

Serjeant *Poole* in reply. My brother has made two points; 1st, He says this is a good lease. 2^{dly}, If it is not, yet this being an action of covenant, it shall be considered as a licence to enjoy, and that *nil habuit in tenementis* is a bad plea to an action of covenant. As to the first he says, that the authority in *Vern.* 262. is only a *dictum*: but I insisted that a committee is only a mere bailiff, and that whatever is committed to him by the crown is only at the will and pleasure of the crown, so that a committee cannot possibly be more than a bare tenant at will of the crown; and it is well known that a tenant at will cannot make a lease, and this I very much rely upon; it is said by my brother that the crown must be considered as having a power to lease by the *stat. de Prærog. Regis.* I think the crown has no such power; but that is not the present case; the question now is, whether the committee during the pleasure of the crown, has power to make a lease; I have proved he has not. But it is objected that this is a bad plea; I say it is both good law and sense, for if it is not in the power of the committee to make the lease, it is a fraud upon the lessee, who is liable to be ousted. This lease is by deed poll, so that *nil habuit, &c.* is the proper plea; if it had been by indenture, the defendant might have pleaded *non demisit.* As to the second point, and to the cases cited to support it, I answer that this action is founded upon covenants that run along with the land, and if the lease be void, the covenants depending upon the estate are gone; what is meant by a licence to enjoy I do not well understand, when it appears the action is upon covenants in a lease; and that *nil habuit, &c.* is a good plea in covenant upon a lease. 3 *Lev.* 193. *Aylett* versus *Williams.*

*Nil habuit,
&c.* to a lease
by deed poll.
Non demisit
to one by in-
denture.

Ch. Justice *Willes.* I think the lease is void, for the committee has no legal power to make a lease; if this had been a lease made by order of the court of Chancery, they would have made the defendant pay costs; but yet if this had been a lease made by their order, I think it would not have been good at law. I think a covenant in the lease to do a collateral thing in a lease might bind, though the plaintiff had no power to make a lease. A committee is certainly no more than a bailiff, but whether he could not well covenant that the defendant might hold the land for two years, and whether the defendant could not have an action of covenant against him if he was ousted, is worth considering.

Clive

Clive Justice. 1. The lease is certainly void at law. *Moor* 4. is in point 2. *Nil habuit, &c.* is a good plea in covenant; as to covenants which run, or do not run with the land, see *Spenser's case*, 5 *R.p.* 16, 17, 18. but all the covenants in this case run with the land, and the deed being void, all the covenants fall to the ground; I have no doubt at all but this is a void lease. Though this is a deed poll, yet there is a covenant on defendant's part, so they are the words of the defendant.

Batburst J. I am of opinion the committee has no power to make a lease. The word *dimisit* is a covenant in law, and here seems to be covenants on both sides. Defendant might bring covenant against plaintiff on the word *dimisit*, so the second point not determined. *Uterius concilium* as to second point.

Memorandum: King George the second died suddenly at his palace at *Kenington* on Saturday the 25th day of *October* 1760. about 7 o'clock in the morning; he fell down in his own chamber when no person was present with him, and was heard to fall by the page in waiting without. *Ut audivi.*

Hilary Term

1 Geo. 3. 1761.

Stackpole versus Earle, Esq; C. B.

IN an action upon the case upon *assumpsit* the plaintiff declared, That whereas the defendant before and at the time of making the promise aforementioned, and afterwards, was surveyor of the baggage of the port of *London*, and was greatly desirous of selling and disposing of his said place, and being so desirous to sell and dispose of the same, on the 1st of *January* 17 8, at *Westminster* in the county of *Middlesex*, in consideration that the plaintiff, at the defendant's request, would use his endeavours to procure, and would procure a proper person to purchase the said place of the defendant, he undertook and promised to pay the plaintiff 2*l.* for

Assumpsit to pay plaintiff 2*l.* per cent. to procure a purchaser of plaintiff's place of surveyor of the baggage of the port of *London*, is bad and contrary to the statute against sale of offices.

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every 100*l.* that such person should give for the purchase of the said place; and the plaintiff avers, that confiding in the said defendant's promise and undertaking, afterwards on the same day and year at *Westminster* aforesaid, he at the defendant's request, used his endeavours to procure, and by means thereof, on the 1st of *March* 1758. at *Westminster*, procured one *John Gunston*, being a proper person to purchase of the defendant the said place for 1200*l.* and that the said *Gunston* did give to the defendant 1200*l.* for the purchase of the said place, whereby the defendant became liable to pay to the plaintiff 24*l.* for the purchase of the said place. There are other general counts on *assumpsit* for work and labour done, &c. but all that ever the plaintiff did for defendant was the procuring a purchaser for the place. Upon *non assumpsit*, the case reserved for the opinion of the court was as above stated in the declaration.

Upon debating this case at the bar, it was urged by the council for the plaintiff, that he was neither a buyer or seller of the place or office, and that what he had done was at the defendant's request, and was neither *malum in se*, nor *malum prohibitum*, and therefore he ought to be satisfied for his labour and trouble; but the whole court were of opinion that it was *malum prohibitum*, and within the statute of 5 & 6 *Ed. 6. cap. 16. sec. 2.* And though the plaintiff himself was neither buyer or seller, yet this appears to be a promise to pay him money, to the intent that a person should have an office belonging to the customs, which is within the very words of the statute; but Mr. Justice *Clive* said he thought the selling of offices was *malum in se* at common law, and that if the statute had never been made, he thought the procuring a person to buy the office of the defendant was not a good consideration in law to raise an *assumpsit*, (which was not denied by any of the judges,) because it was illegal; as if a gaoler permits a prisoner to go at large upon his promising to satisfy the debt for which he is imprisoned; he escapes by the consent of the gaoler, and does not pay the debt according to his promise, the gaoler brings *assumpsit*, but shall not recover because the consideration was illegal; for it is a most certain principle that every consideration to ground an *assumpsit* upon, must be lawful. *Vide Tomkins and Bennet, 1 Salk. 22. Co. Lit. 234 a. Sir Arthur Ingram's case, 16 Viner 126. pl. 3. Smith, v. Colehill, 1 Ro. Abr. 16. 1 Ro. Rep. 313. Dyer 18. pl. 13.*

Judgment for the defendant.

Roe on the demise of Parry *versus* Hodgson. C. P. Aute 129

SEE this case before in *Trinity* 33, 34 Geo. 2. The court were now all clearly of opinion that a guardian of an infant cannot make a lease of the infant's lands, and that the lease in this case was absolutely void.

Judgment for the defendant.

Trinity Term

1 Geo. 3. 1761.

Anonymus. C. B.

A trader, before he commits any act of bankruptcy, draws a promissory note for 200*l.* payable to *B.* or order, then *A.* commits an act of bankruptcy, and afterwards *B.* indorfses the note over to *C* who is the petitioning creditor; and it was held *per totam curiam*, That he may well be so, for the 200*l.* was a debt due from the bankrupt before he committed the act of bankruptcy to somebody, *viz.* to *B.* June 1, 1761.

Bankrupt.
Indorsee of a
note after the
act of bank-
ruptcy may be
the petition-
ing creditor.

Michaelmas

Michaelmas Term

2 Geo. 3. 1761.

Lockyer versus East-India Company. C. B.

A special jury
of London at
the bar in
Middlesex,

AN action of covenant upon a charter-party was tried at the bar by a special jury of the citizens of *London*, who all consented to be sworn, and waived any privilege as citizens of *London*, in not being obliged to go out of the city to serve on juries.

N. Lord C. Justice *Willes* was absent all or the most part of this term, so that there was not much business done. He died on or about the 15th of *December* 1761. at his house in *Bloomsbury-square*.

Hilary Term

2 Geo. 3. 1762.

JANUARY 23, 1762. Sir *Charles Pratt*, Knt. the King's Attorney General, and *John Burland*, Esq; were called to the degree of serjeants at law.

Emblema Annuli—*Tu satis ambobus.*

Monday, January 2, 1762. The Right Honourable Sir *Charles Pratt*, Knt having lately been appointed by the King, Lord Chief Justice of His Majesty's court of the Bench, took his place there this day.

Anonymus

Anonymous. C. B.

A Declaration without notice to plead, was delivered to the defendant; and some time afterwards a notice in writing was given to the defendant to plead within eight days (he living above 40 miles of London), this was held to be a good declaration and a good notice to plead, although it was not given at the time of the delivery of, or written on the back of the declaration. *Whitaker* for the plaintiff, *Hewitt* for the defendant.

Practice.
Notice to
plead after the
declaration
was delivered
held good.

Paris *versus* Salkeld. C. B.

ISSUE was joined in this cause, and the *venire facias* was awarded returnable *quinden Hilarij*; which is the 27th day of January; after this last continuance the defendant on the 30th of January pleaded generally, that *puis darrein continuance, viz.* On such a day he became a bankrupt, and that the cause of action did accrue before such time as he became a bankrupt, and *hoc paratus est verificare &c.* And verified this plea by an affidavit. Upon the motion of serjeant *Nares* a rule was made to shew cause why this plea should not be set aside, as a frivolous and dilatory plea, alledging that by law it was wholly in the discretion of the court whether they would receive the plea or not; for which purpose he cited *Tilv. 180. Moore v. Hawkins*; that the plea is bad because it doth not alledge that the defendant hath in all things conformed, and obtained his certificate, and that it was not pleaded in due time.

Plea puis le
darrein con-
tinuance can-
not be reject-
ed by the
court if it be
verified by an
affidavit

2 B. & C. 249

3 B. & C. 612

To which, upon shewing cause, it was answered by serjeant *Hewitt*, that the plea was an honest and fair plea, and pleaded generally, as the *Stat. 5 Geo. 2.* directs, and was in due time, for the fact happened since the issue between the parties was joined, and the last continuance (which is the return of the *venire*) was upon the 27th of January; and this plea was put in upon the 30th of January which is the *quarto die post*, or day of grace of that return, and he insisted that the court could not by law reject the plea, but were bound to receive it, and that if his brother *Nares* thought it a bad plea he must demur to it; this plea may conclude either in bar or abatement, and in either way it is peremptory, and you may either take issue upon it, or demur. *Cro. J. 261.*

The *Ch. Justice* and *Clive Justice*, at first seemed to think that it was in the discretion of the court whether they would receive this plea or not; but *Batburst* justice said he thought the court were bound to receive it, and could not determine whether it was a good

PART II.

N n

plea

plea or not, but only upon a demurrer; upon which the *Ch. Justice* ordered the matter to be debated at another day, as to this point, whether it was in the discretion of the court to reject this plea; whereupon it was spoken to a second time, when the court were all clearly of opinion that they had it not in their power to reject the plea; and the *Ch. Justice* said that such discretion was contrary to the genius of the common law of *England*, and would be more fit for an Eastern monarchy than for this land of liberty; *nulli negabimus, &c. Justiciam*; and there is no difference between a plea *puis darrein continuance* and any other defence, but this, *viz.* That the fact which warrants this plea first existed or happened since the last, and before the next continuance, it is a defence which the party could not possibly make when he first pleaded, and which he is bound to make after the last continuance, and before the next; It must be verified by affidavit, for if it was not to be so, great delays would ensue by pleas of this kind. The case in *Yelv.* was relied upon by serjeant *Nares*, that it was in the discretion of the court to reject this plea, but the books in general are to the contrary; and the doubt in *Yelv.* was, whether he had a power to receive this plea at the assizes; and the judges determined that the plea ought to be received; but see the same case in *Cro. Jac.* 261. which says the plea may be received at the discretion of the justices, if they perceive any verity therein; and the case in 1 *Stra.* 492. proves that the plea must be received, if it be verified by an affidavit, for in that case the plea was frivolous and untrue, so was rejected. *Clive Justice* said, he thought the plea in the present case was a bad plea, but was of opinion that it could not be determined but upon a demurrer. *Bathurst J.* said, the court must receive this plea as it is verified by affidavit, and that there was no case to be found wherever this sort of plea was rejected, because not good in point of law. *Noel J.* of the same opinion.

So the plea was received, and the rule discharged.

Easter Term

2 Geo. 3. 1762.

Paris *versus* Salkeld. C. B. Ante 137.

This case overruled the case in P. 1761 at: lived. William v. Giordani 1761. K. B.

THE defendant pleaded *puis darrein continuance*, viz. that on such a day he became a bankrupt, and that the cause of action accrued before such time as he became a bankrupt, and concluded with an averment in bar; the plaintiff demurred; and now it was objected by serjeant *Nares* that the plea was bad, because it is not alledged by the defendant that he had conformed himself to the statutes of bankrupt, nor obtained his certificate. 2dly, It is not said that this plea is *vig re statuti*; to which it was answered by serjeant *Hewitt* that the plea was general, and exactly as the *stat. 5 Geo. 2.* directs, the words whereof are, That in case any bankrupt be impleaded for any debt due before such time as he became bankrupt, he shall be discharged upon common bail, and may plead in general that the cause of action accrued before such time as he became a bankrupt, and may give the statute and the special matter in evidence; so that he insisted the defendant had no occasion to alledge that he had conformed and obtained his certificate, which certificate (he said) was matter of evidence; and as this plea concludes in bar, the plaintiff might have replied that the defendant hath not conformed, &c. nor obtained his certificate; indeed he admitted, that if the statute had not chalked out this general manner of pleading, he should have thought it necessary for the defendant to have alledged that he had conformed, &c. To the second objection that the plea is not said to be *vigore statuti*, it was answered, that was mere matter of form, and is not shewn for cause of demurrer.

Plea puis le darrein continuance that defendant became a bankrupt, &c. the plea must alledge that he hath conformed, or it is bad.

Imp. Y 4.

Pratt C. Justice inclined to think that the plea was bad, and said, that whenever a party comes to excuse or intitle himself, he ought to alledge every circumstance that intitles him to that thing; and this, he said, was a general rule in pleading; so here he thought it necessary to have been alledged by the defendant that a commission issued against him, that he surrendered and conformed himself; the words of the statute are, *such* bankrupt shall be discharged on common

mon bail, &c. the word *such* must mean a bankrupt who has conformed himself. He said it was clear law that a bankrupt cannot be discharged absolutely before he obtains his certificate. He said he thought it ought to be pleaded *vigore statuti*, otherwise the court must consider the plea as at common law, and then every thing ought to be alledged; but this plea only says that the defendant has submitted to be examined, &c. and is ready to conform, &c. not that he has conformed.

Bathurst J. said he thought the court must take notice whether the plea be within the statute, although it be not said *vigore statuti*, &c. but seemed to be clear in opinion that the plea was bad, because it did not aver that the defendant had conformed, &c. and that the plaintiff ought to have judgment; but the case was adjourned for further consideration. *Vide 2 Ld. Raym. 1546. Comyns 205. 1 Wms. 249. Henderson and Winter, Hil. 11 Geo. 2. B. R. — v. Tomlin, Mich. 5 Geo. 2. B. R. 1 Stra. 492.*

Afterwards at another day in this term, the Ch. Justice said, we are clear of opinion that the plea is bad, because the defendant hath not averred that he has conformed, &c. according to the several statutes concerning bankrupts. Judgment for the plaintiff, *Clive* and *Noel* Justices *absentibus*.

Henchett *versus* Kimpson. C. B.

Landlord intitled to one year's rent before defendant can sell upon an execution for costs on a nonsuit.

C. J. Pratt. THE defendant had judgment of nonsuit against the plaintiff, and upon a *fieri facias* took the plaintiff's corn in execution, which was unthreshed; the landlord immediately gave the sheriff's bailiff notice that there was 30*l.* due to him from the plaintiff for one year's rent, and after *this*, the bailiff proceeded to thresh the corn, and sold the same for 21*l.* and upwards; and now the sheriff and defendant, upon shewing cause why they should not pay the landlord one year's rent, insisted that a defendant's execution was not within the *stat. 8 Anne*, which was made in favour of landlords, but that the statute only extends to executions at the suit of plaintiffs; *sed non allocatur*, for the words of the statute are, "No goods upon any tenements leased shall be taken by any execution, unless the party at whose suit the execution is sued out shall before the removal of such goods pay to the landlord of the premises all money due for rent for the premises; provided the arrears do not amount to more than one year's rent; and in case the arrears shall exceed one year's rent, then the party at whose suit, &c. paying the said landlord one year's rent, may proceed to execute his judgment; and the sheriff is required to levy and pay to the plaintiff as well the money

" paid

3 Bv A 446

6 Bv 467

2 Bv 418

“paid for rent as the execution money.” And the statute shall have a liberal construction; and the words, “*Party* at whose suit the execution is sued out, &c.” shall be construed to mean either plaintiff or defendant, whose judgment and execution it is. It is further insisted that in all events the sheriff shall not be answerable to the landlord for more than 2*l*. which the corn was sold for. This is a matter of importance which sheriff’s officers ought to understand; before this statute, executions took place of all debts that were not *specific liens*, even of rents due to landlords; it was thought hard that landlords should not have something like a *specific lien*; so the parliament have given them this remedy for one year’s rent but for no more, because *vigilantibus & non dormientibus jura subveniunt*. Neither a plaintiff or defendant has any right to go upon the premises; the law gives this entry to the sheriff only by virtue of the execution, but after he has notice of rent being due to the landlord he cannot remove the goods before he has satisfied the landlord one year’s rent; the landlord shall have the like benefit of distress for one year’s rent as if there had been no execution at all; unless the rent be paid, the sheriff must quit, and if he does not quit, a special action on the case lies against him after notice of the rent due; but there is a shorter way by motion to the court, as in the present case, that the landlord may have restitution to the amount of the goods the sheriff has sold; the bailiff in this case became a wrong-doer immediately after he had notice of rent being due to the landlord. *Per curiam*, Let the prothonotary take an account of the goods taken in execution, and what they were sold for, and let the sheriff be allowed such costs as incurred before notice given him of the rent due to the landlord, and after all just allowances let the rest of the money be paid by the sheriff to the landlord. Brother *Hewitt* for the landlord, brother *Nares* for the sheriff.

Marriot *versus* Lister. C. B.

CASE upon eight several counts in *assumpsit*, upon the general issue there was a general verdict and damages given for the plaintiff upon all the counts. And now it was moved in arrest of judgment that one of the counts was bad, and therefore as intire damages were taken upon this count as well as the rest, judgment ought to be arrested; the count objected to, runs thus—“Whereas *James Lister* (such a day and year, at such a place) was indebted “to *Thomas Marriot* in 20*l*. for the like sum before that time lent “and advanced by the said *Thomas* to *James Dalrymple*, at the special instance and request of the said *James Lister*, and being so “indebted he the said *James Lister* in consideration thereof afterward, to wit, at such a time and place, promised to pay to the

Assumpsit against defendant for money lent to a third person, bad after verdict, and judgment arrested,

PART II.

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“ plaintiff

“ plaintiff the said 20*l.* when requested.” *Per Curiam*, the word *lent* is a technical term, and no man can be indebted to another for money lent, unless the money be actually lent to that person himself; but this count alleges that the defendant is indebted to the plaintiff for money lent to a stranger *James Dalrymple*. Now *James Dalrymple* is certainly indebted to the plaintiff, because the money was lent to *James Dalrymple*, and the law raises the promise which is not necessary to be proved; therefore if *James Dalrymple* is indebted to the plaintiff for this sum lent to him, the defendant cannot be also indebted to him for it, because there cannot be a double debt upon a single loan. This is a special undertaking or promise to pay a sum of money lent by the plaintiff to a stranger, which the law does not raise, and therefore such special promise is traversable, and must be proved; but upon an *indebitatus assumpsit* for money lent to a defendant the law raises the promise, which is not traversable, and need not be proved. In short it is absurd to affirm *A.* is indebted to *B.* for money lent to *C.* for the same money cannot be lent to two persons severally; and so is *1 Salk. Butcher* against *Andrews*. And the judgment was arrested. *Hewitt* serjeant, for the defendant, *Davy* and *Burland* serjeants, for the plaintiff.

Trinity Term

2 Geo. 3. 1762.

How versus Denin. B. R. June 18. in error from C. B.

Want of
pledges can-
not be taken
advantage of
in error.

THIS was an action upon the case on several promises by bill against an attorney of the Common Pleas; judgment was given there by *nil dicit*, and upon error brought the common errors were assigned; and also that there were no pledges to prosecute appearing upon the record.

It was insisted for the plaintiff in error that the want of pledges is matter of substance, and in this case, being a judgment by default, was not aided by any statute, and many cases were cited, to shew it was substance and not mere matter of form, as *Dier* 288. *Cro. Car.*

Car. 91. Hutton 92. Hetley 59. Ro. Rep. 205. 12 Mod. 198. 16 Viner 396. p. 13. But per curiam, (without hearing counsel for the defendant in error,) By the Stat. of 4 & 5 Ann. for the amendment of the law this is become mere matter of form, and cannot be taken advantage of in error now, whatever it might have been before that statute; and if the defendant had thought fit to have taken advantage of this defect of form, he ought to have demurred and shewed it for cause in C. B. and then the plaintiff there might have moved to amend; but not having done so, we will not reverse the judgment for this mere defect of form; And the judgment was affirmed.

Brudnell *versus* Roberts. C. B.*art & Deft*

Covenant brought by the plaintiff upon a lease for years, as heir in reversion in fee to his father, and breach assigned for want of repairs; defendant pleads that the father when he made the lease to him was only tenant for life, and that the father being dead the lease is determined, *absque hoc* that after the making of the said indenture of lease the reversion belonged to James Brudnell (the father and his heirs,) as the plaintiff hath alledged in his declaration. Demurrer and joinder.

Covenant as heir, and breach assigned for want of repairs, on a lease for years; plea that lessor was only tenant for life, and traverses that the reversion was in him and his heirs, good.

It was argued by serjeant *Herbitt* for the plaintiff, that this plea was bad, because wherever a lessee accepts a lease for years by indenture, he shall be estopped to say that the lessor *nil habuit in tenementis*, and the plaintiff need not reply *that estoppel*, but may demurr, because the declaration is on the indenture, and the *estoppel* appears upon the face of the record; otherwise if he had declared *quod cum demississet*, &c. 1 *Salk.* 277. *Kemp v. Goodall*; and this is clearly law, for so is *Co. Lit.* 47. *Cro. Jac.* 312. *Cro. Eliz.* 262. And not only the lessor himself, but the grantee of the reversion, and all parties claiming under them, will have the benefit of the estoppel, which (he said) ran along with the lands; and that the plaintiff claiming as heir under the lessor, his ancestor stands in his place. *2dly*, It was urged for the plaintiff that the traverse was defective and uncertain; but I heard nothing said to shew that it was uncertain.

On the side of the defendant it was argued by serjeant *Nares*, That this was an action of covenant brought by the plaintiff upon an indenture of lease for years made by the father of the plaintiff to the defendant, and breach assigned for want of repairs, upon a covenant in the lease; the defendant pleads that the plaintiff's father the lessor was only tenant for life, that he is dead, and the lease is determined, and traverses as above; that the lease being now at an

end, there is an end of all the covenants therein, and of this action a lease for years by tenant for life is so absolutely determined, that no acceptance of rent by the successor to the land can make it good. *Co. Lit.* 341. *b.* Nares serjeant admitted that during the life of tenant for life (of the lessor) and the continuance of the lease, the defendant would have been estopped to say he had not the reversion in him; but he being dead, and the lease thereby at an end, the lessee is, as it were, unmuzzled, and is not estopped to plead the truth, which he has done by this plea, in confessing the lease and avoiding it: and of that opinion was the whole court; they also held that the traverse was well taken; and judgment was given for the defendant *per totam curiam*. See *Co. Lit.* 47. *b.* *si non que le lease soit per fait indent*, &c. very apposite to the point of estoppel. N. Clive Justice said, the defendant might either traverse that the father was not seised of the reversion in fee, or that it did not descend to the plaintiff; *quod fuit concessum*.

Handasyde *versus* Morgan in debt on a bond. } Error.
Same *versus* Same upon a note of hand. }

Time refused to perfect bail in error, because no real error could be suggested, so court thought it brought for delay.

AFTER verdict, plaintiff in error put in bail in due time; a rule for better bail was served upon the maid servant of Mr. Cox the attorney for plaintiff in error upon a *Tuesday*. On *Saturday* following this notice came to the knowledge of Mr. Cox, and not before, as appeared by the affidavit of himself and two of his clerks. Upon this I moved for two days time to perfect the bail; but the court absolutely refused to give any time, unless I would shew them there was some real error in the record; which as I was not able to do, they took it for granted that the writ of error was brought merely for delay, and the rule to shew cause why the plaintiff should not have two days to perfect his bail was discharged.

Davy for defendant in error.

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Crowder *versus* Rooke. C. B.

Trial had after the day of *nisi prius*, the *jurata* is not amendable, and *ve. fa. de novo* awarded, the trial being *coram non judice*.

THIS cause was at issue, and the record of *nisi prius*, *habeas corpora*, and *jurata*, were all made up for trial at a certain sittings; but the cause not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record of *nisi prius*, writ, and *jurata*, for a future day of sitting, but neglected so to do, or to re-seal the same, although he was apprized thereof, so the cause was tried at a future day, and it appeared upon the face of the *jurata*, &c. that the cause was tried after the day of *nisi prius* mentioned therein; and there was a verdict for the plaintiff; and now the

the plaintiff moved to amend the *habeas corpora*, and the *jurata*, and the defendant moved to set aside the verdict. A rule was made to shew cause why the amendment should not be made, and upon shewing cause the whole court were clearly of opinion that the trial was *coram non judice*; and discharged the rule for an amendment but were of opinion that they ought *ex officio* to order a *venire de novo* to be awarded; which was ordered accordingly.

Michaelmas Term

3 Geo. 3. 1762.

Chapman *versus* Pickersgill. C. B.

2 Ind. 519

4 Br. 178

3 Burr. 1418

ACTION upon the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff, who declared upon three counts; in the first, having stated his honesty he alledges that the defendant did falsely and maliciously exhibit a petition to the Lord Chancellor that the plaintiff was indebted to him in 200*l.* and had committed an act of bankruptcy, that the commission thereupon issued, and the defendant was declared a bankrupt, and that afterwards the commission was superseded; and the plaintiff avers that he never committed any act of bankruptcy; the second count is much the same with the like averment; the third count is much the same, but without such averment. To this the defendant pleaded the general issue, and there was a general verdict and damages for the plaintiff, taken upon all the three counts; whereupon it was moved that the judgment might be arrested for two reasons; first, because this action will not lie, there being in this case a particular remedy given by the statutes of bankrupt, 5 Geo. and 5 Geo. 2. which enact, that before any commission shall issue, the petitioning creditor shall (amongst other things) give bond to the Lord Chancellor in the penalty of 200*l.* to be conditioned for proving his debt and the party a bankrupt before the commissioners and upon a trial at law, &c. and if it shall appear that the commission was taken out fraudulently or maliciously, the Chancellor may order satisfaction to the party

Case for falsely and maliciously suing out a commission of bankruptcy which was afterwards superseded, is a very proper action at law, though the Chancellor has power to give 200*l.* damages by statute.

PART II.

P p

grieved,

grieved, or may assign the bond to the said party, who may sue the same in his own name. The second point on which the judgment was moved to be arrested was, because it is not averred in the third count, that the plaintiff was not indebted to the defendant in 200*l*. or that he never committed any act of bankruptcy.

This case was argued twice at the bar, in two former terms by serjeant *Hewitt* and serjeant *Burland* for the defendant, and by serjeant *Whitaker* and serjeant *Nares* for the plaintiff; and in this term the Lord Chief Justice gave the opinion of the whole court, that judgment must be for the plaintiff.

Lord Chief Justice. Upon the arguing of this case, the first objection was, that this action will not lie, there being a remedy given by statute, that a proceeding on a commission of bankruptcy, was a proceeding in nature of a civil suit; and that no action of this sort was ever brought: but we are all of opinion that this action is maintainable;

The general grounds of this action are, that the commission was *falsely* and *maliciously* sued out, that the plaintiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a *supersedeas* to the commission; here is *falsehood* and *malice* in the defendant, and great wrong and damage done to the plaintiff thereby. Now wherever there is an injury done to a man's property by a *false* and *malicious* prosecution, it is most reasonable he should have an action to repair himself. See 5 *Mod.* 407, 8. 10 *Mod.* 218. 12 *Mod.* 210. I take these to be two leading cases, and it is dangerous to alter the law. See also 12 *Mod.* 273. 7 *Rep.* *Bulwer's* case 1. 2 *Leon.*—1 *Ro. Abr.* 101. 1 *Ven.* 86. 1 *Sid.* 464. But it is said this action was never brought; and so it was said in *Askby* and *White*; I wish never to hear this objection again. This action is for a *tort*; *torts* are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief, and this of suing out a commission of bankruptcy *falsely* and *maliciously*, is of the most injurious consequence in a trading country.

It is further said the *Stat.* 5 *Geo.* 2. has given a remedy, and therefore this action will not lie; but we are all of opinion, that in this case the plaintiff would have been intitled to this remedy by action at common law, if this act had never been made, and that the statute being in the affirmative, hath not taken away the remedy at law. 2 *Raym.* 163. and this is an universal rule, that an affirmative statute is hardly ever repealed by a subsequent affirmative statute, for if it is possible to reconcile two statutes they shall both stand together; if they cannot be reconciled, the last shall be a repeal

peal of the first; but the most decisive answer is, that this statute-remedy is a most inadequate and uncertain remedy; for though there be the most outrageous malice and perjury, and the party injured suffer to the amount of ten or twenty thousand pounds yet the Chancellor has no power to give him more than the penalty of 200*l.* besides, the method of applying to the Chancellor, is more tedious, expensive and inconvenient than this common law remedy, and this case in it's nature is more properly the province of a jury, than of any judge whatever.

It is further objected, that in the third count there is no averment that the plaintiff was not indebted to the defendant, or ever committed an act of Bankruptcy; but no case was cited to shew such averment to be necessary; the ground and substance of the declaration is *falsehood and malice*; there are no instances of such averments in *conspiracy*, that the party was innocent, or did not do the fact on which he was indicted, but the precedents are the other way. In an action for words, as for saying a man is a thief, the plaintiff has no occasion to aver he is not a thief, and this case is analogous; for after the plaintiff has alledged that the commission was *false and malicious*, it would be tautology, to make such averment that he was not indebted, &c. and this declaration would have been good on a demurrer; more clearly it is so, after a verdict.

Judgment for the plaintiff.

Marriot *versus* Lister. C. B.

THIS was an *indebitatus assumpsit* against defendant for money lent and advanced by the plaintiff to a third person at the defendant's request; and after a verdict for the plaintiff, the judgment was arrested in *Easter* term last; *vide* this case before, *Easter* 2 Geo. 3. Now the plaintiff (having brought a writ of error) produced an original writ, wherein it appeared that this count was for money paid and advanced to a third person at the request of the defendant; and it was moved by serjeant *Nares* that the count might be amended by the writ, by striking out the word *lent*, and inserting the word *paid* instead thereof; who alledged that it was the constant practice in the King's Bench, when a declaration happened to be faulty, to file a bill which was right, and to amend thereby, and that the court *there*, never inquired whether the bill was filed *before* or *after* the declaration; and cited 2 *Stra.* 1151. *Wilder v. Handy*; which was trespass for killing a dog: after a verdict for the plaintiff it was moved in arrest of judgment, that the declaration ran by recital, "Whereas, &c. but a bill being filed right (the time of filing, the court refused to inquire into,) ordered it to be amended; and in *Mich* 23 Geo. 2. *Smith v. Ledbury*, it was laid in trover that the

Amendment
of declaration
after verdict
refused.

the *defendant* was possessed of a horse instead of the *plaintiff*; it was moved to amend, but *Lee C. J.* said there must be a bill filed right to amend by; afterwards a bill made right was filed, and the court amended the declaration by it, though the possession was the very *gist* of the action. But *per C. J. Pratt & tot' curiam*, We must presume the plaintiff proved money *lent*, for your verdict is for money *lent* to a third person, and no precedent can be shewn wherever such an amendment as this prayed was ever made; the amendment now prayed, is at the common law; the statutes of amendment lead us to see what power we had at law to amend, we had no power to amend after the first term when the record was made up and the roll carried in; but since the statutes, courts have gone a great way further. See 3 *Lev.* 347. but there is no statute goes so far as to impower us to make an amendment, which would alter the trial, or the issue; the issue at the trial was, whether the plaintiff lent a third person money at the defendant's request, and you would now make the issue to be, whether the plaintiff paid a third person money at defendant's request, this would be to alter and change the record in a most substantial point; we are bound by the record and the verdict, and must take it to be true that every part of the declaration was proved at the trial: the plaintiff has mistaken his action; and if we were to allow this amendment, great inconvenience would ensue; for then, we should lay down a rule that whenever the plaintiff had obtained a verdict in a case where he had no legal cause of action, he might afterwards sue out an original writ, wherein he had good and legal cause of action, and amend his record thereby, and recover upon an issue which had never been tried; for it has never been tried in this cause whether plaintiff paid money to a third person at the instance of the defendant, but only whether he lent money to a third person at the defendant's request: and for these reasons the amendment was refused, notwithstanding the practice of the King's Bench was very much insisted upon by the plaintiff. Brother *Nares* for the plaintiff, brother *Hewitt* for the defendant.

Wills *versus* Maccarmick. C. B.

Debt upon an award, nil debet, Partiality in the arbitrators not allowed to be given in evidence.

DEBT upon an award, whereby it was awarded that the defendant should pay to the plaintiff 150*l.* 16*s.* 9*d.* &c. The defendant pleads that he doth not owe to the plaintiff the said 150*l.* 16*s.* 9*d.* and thereupon they were at issue, which was tried before Mr. Justice *Noel* on the western circuit, and a verdict was found for the plaintiff; and now it was moved for a new trial by serjeant *Davy*, because the judge refused to permit the defendant to give in evidence *partiality* in the arbitrators in making the award; *Davy* insisted that in this case the defendant could plead nothing but *nil debet*, and might thereupon give in evidence any matter that destroys the

the action; that partiality and corruption in the arbitrators made the award void, and being so, the action was destroyed. But *per curiam*, The plea of *nil debet, prima facie* admits the award, and there never was an instance where this kind of evidence was permitted to be given; it would be to suffer evidence that affects third persons, the arbitrators themselves; an award is a judgment by judges chosen by the parties themselves, and a jury in a special verdict cannot find any matter or fact *debors* the award; by parity of reason nothing *debors* the award (as partiality is) can be given to them in evidence; if this evidence was permitted, the plaintiff would be wholly unprepared at the trial, for all that he has to do, is, to prove the submission and the award; the corruption or partiality of the arbitrators may be wholly unknown to the plaintiff, it concerns the arbitrators themselves; in a trial at law, this matter of partiality and corruption can never be got at, there is no precedent at law of any *writ* to set aside an award, and we must go by precedent; there is no case wherever this matter hath been pleaded; the *Stat. Will. 3.* shews that an award at law must stand, for that statute says, that with respect to awards made according to that statute they shall stand, unless controverted and set aside in two terms, The remedy in this case is in equity, or at law by action against the arbitrators if they have been corrupt. New trial refused, and judgment for plaintiff. Serjeant *Stanisford* and *Hewitt* for plaintiff, *Davy* and *Burland* for defendant.

Hilary Term

3 Geo. 3. 1763.

JANUARY the 24th 1763. the honourable Sir *Henry Gould*, Knight, one of the Barons of the court of Exchequer, having lately been appointed by the King one of the justices of his court of the Bench, took his place there this day.

PART II.

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Anony-

Anonymus.

Debt on bond,
payment be-
fore the day
pleaded is ill.

DEBT on a bond with condition for the payment of a certain sum of money on a certain day; defendant pleads payment before the day; plaintiff replies that the defendant did not pay before the day, *et de hoc ponit se super patriam*; defendant demurs, and plaintiff joins in demurrer.

Nares serjeant for the defendant admitted that the plea at first was bad, but insisted the plaintiff had made it good by replying and tending issue upon it, or that if the issue was immaterial, there ought to be a replender.

Hewitt serjeant *contra*. This is a case where defendant has not joined issue to the country, but has put himself upon the judgment of the court; and though the replication be bad, yet whenever the case is upon a demurrer, the court looks for the first fault, which is in the plea here; and therefore judgment ought to be for the plaintiff; and of that opinion was the court, and gave judgment for plaintiff.

Easter Term

3 Geo. 3. 1763.

Repington, Esq; Executor, &c. *versus* The Governor of Tamworth Shcool and Collins, clerk. C. B.

7B16113

AB. being seised of the advowson of a donative, the church, in his life-time, becomes void, then A. B. dies, (the church being still void) having first made his will and the plaintiff his executor, who has brought this *quare impedit*, supposing himself intitled to this turn, as an executor is, in the case of a presentative benefice; after two arguments in the C. B. the whole court was clearly of opinion that the right of donation descended to the heir of

of *A. B.* and that his executor had no title, which he would have had, if it had been a presentative benefice.

It was said by the court, in giving this judgment, that before the council of *Lateran* all benefices were like what donatives are now, that no lapse could have incurred in ancient times, and that bishops had no right of institution before the time of *Ric. 2. Ante concilium Lateranense* (says *Bracton*) *nullum currebat tempus contra præsentes.* *Seld. Hist. Tithes, cap. 12. fo. 380.* And the C. Justice said, the author of the *Codex* never read this chapter of *Selden*, or he has imposed upon the public; he said there is no case in the books to exclude the heir of a donative from his turn in this case, that a patron of a donative can never be put out of possession by an usurpation; after a verdict for the plaintiff executor, &c. judgment was arrested, and the title to the turn adjudged to be in the heir at law *per totam curiam.*

The King *versus* John Wilkes, Esq; Member of Parliament for Aylesbury. C. B.

A member of parliament discharged, without bail, being committed for writing a seditious libel. * The word TENOR is put by the author in contradistinction to the word PURPORT. The general warrant.

ON Saturday April 30, 1763. in the morning the defendant *Wilkes* was arrested by two of the King's messengers, by virtue of a warrant from the secretary of state; the * TENOR of which warrant is in the words following: "George Montagu Dunk earl of Halifax, viscount Sunbury and baron Halifax, one of the lords of his Majesty's most honourable privy council, lieutenant general of his Majesty's forces, and principal secretary of state: These are in his Majesty's name to authorize and require you (taking a constable to your assistance) to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intituled, THE NORTH BRITON, NUMBER XLV, SATURDAY, APRIL 23, 1763. printed for G. Kearsley in Ludgate-street, London, and them, or any of them, having found, to apprehend and seize, together with their papers, and to bring in safe custody before me to be examined concerning the premises, and further dealt with according to law; and in the due execution thereof, all mayors, sheriffs, justices of the peace, constables, and all other his Majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's the twentieth sixth day of April in the third year of his Majesty's reign.

Dunk Halifax.

"To Nathan Carrington, John Money, James Watson,
"and Robert Blackmore, four of his Majesty's messengers in ordinary.

The

The same morning, a copy of the above warrant having been obtained from the messengers, who then had Mr. *Wilkes* in their own custody, and an *affidavit* being made of the truth of such copy, and that Mr. *Wilkes* was then in custody of two of the above messengers at his house in *Great George-street* in *Westminster*, the same were produced in the court of Common Pleas the same 30th day of *April* at twelve o'clock at noon, or a few minutes before or after that hour; whereupon, at the same time, it was moved by my learned brother *Glynn*, that a writ of *habeas corpus* might be allowed to issue *instantly*, returnable *forthwith*. The Lord Chief Justice *Pratt* was pleased to say that *this* was a most extraordinary warrant; and the court ordered an *habeas corpus* to be issued instantly, returnable *forthwith*. It being now about one o'clock, the rule of court for the issuing the *habeas corpus* could not possibly be drawn up and entred, nor could the writ be made out, signed and passed under the seal of the court before four or five o'clock in the afternoon: and although it was certainly known by the officers under the crown, particularly by Mr. *Webb**, then solicitor to the treasury, that this writ had been ordered to issue by the court between twelve and one o'clock, while Mr. *Wilkes* was in the custody of the messengers at his house in *Great George-street*, yet, before the coming of the writ to the messengers, (the same afternoon about five o'clock) Mr. *Wilkes* was hastily (I had almost said in contempt of the King's high court) committed to the *Tower of London*.

* Who had been a common attorney all his life before.

† *Ld. Halifax*.

Mr. *Wilkes*'s solicitor, and one of his counsel, soon after they heard of such commitment went to the *Tower* in order to consult and advise with him, but were denied admittance to him; Major *Ransford* informing them that he had received orders from the † secretary of state not to admit any person whatsoever to speak with, or see Mr. *Wilkes*; and further informed them, that he had just before refused the right honourable *Earl Temple* such admittance, *ut audiui*,

On *Sunday May* the first, the same gentlemen went again to the *Tower*, between the hours of twelve and one, on the same occasion, but were again denied admittance to see or speak with Mr. *Wilkes*; and soon afterwards, several noblemen and gentlemen of the first distinction were refused admittance to see or speak to Mr. *Wilkes*, and particularly his own brother was refused, *ut audiui*.

After such denial, Mr. *Wilkes*'s solicitor demanded of Major *Ransford* a copy of the warrant of commitment of Mr. *Wilkes* to the *Tower*, which was readily granted by the major, the TENOR whereof is in the words following: " Charles earl of Egremont
" and George Dunk earl of Halifax, lords of his Majesty's most
" honourable privy council, and principal secretaries of state: These
" are in his Majesty's name to authorize and require you to receive
" into

“ into your custody the body of John Wilkes, Esq; herewith sent you,
 “ for being THE AUTHOR AND PUBLISHER OF A MOST INFAMOUS
 “ AND SEDITIOUS LIBEL, INTITLED, THE NORTH BRITON,
 “ NUMBER XLV. TENDING TO INFLAME THE MINDS AND
 “ ALIENATE THE AFFECTIONS OF THE PEOPLE FROM HIS
 “ MAJESTY, AND TO EXCITE THEM TO TRAITEROUS INSUR-
 “ RECTIONS AGAINST THE GOVERNMENT, AND TO KEEP HIM
 “ SAFE AND CLOSE, until he shall be delivered by due course of
 “ law; and for so doing this shall be your warrant. Given at
 “ St. James's the 30th day of April 1763. in the third year of his
 “ Majesty's reign. Egremont, Dunk Halifax.

To the right honourable John lord Berkley of Stratton,
 constable of his Majesty's Tower of London, or to the
 lieutenant of the said Tower, or his deputy.

Mr. Webb, solicitor to the treasury, being present in major Ran-
 ford's room when the copy of the said warrant of commitment was
 granted, Mr. Wilkes's counsel and solicitor applied to Mr. Webb for
 admittance to Mr. Wilkes, whereupon (it is true) Mr. Webb desired
 the major to allow such admittance, and said he would be answer-
 able, and indemnify the major; but the major, with the true spirit
 of an excellent officer, answered, “ he would not, or he could not dis-
 “ obey orders; Mr. Webb replied and said he imagined, or he be-
 lieved, there must have been some mistake in the orders, and that
 if either of the secretaries of state were in town, he would apply
 and endeavour to obtain the desired admittance, and that if he could
 succeed therein he would send or bring an order for that purpose in
 the afternoon of the same Sunday, May the first; whereupon Mr.
 Wilkes's counsel and solicitor departed from the Tower for some
 hours, and between the hours of eight and nine in the evening of
 the same day, returned again to the Tower, and applied for admit-
 tance to Mr. Wilkes; but the major not having received any orders
 or message from either of the secretaries of state, or from Mr. Webb,
 refused admittance, as he had done before, *ut audiui*.

On Monday the 2d day of May, at the sitting of the court of Com-
 mon Pleas in the morning the messengers returned the writ of *Ha-
 beas Corpus* which had issued and been delivered to them on the 30th
 of April in the afternoon after Mr. Wilkes was out of their custody,
 and committed to the Tower as above; the TENOR of which re-
 turn indorsed on the same writ runs thus, *viz*. “ In obedience to the
 “ within command, We humbly certify, to his Majesty's justices of
 “ the court of Common Pleas at *Westminster*, that at the time of the
 “ coming of this writ to us, the within named *John Wilkes* was
 “ not, nor at any time since hath been in our custody, or in the cus-
 “ tody of either of us; signed by two of the messengers to whom
 “ the writ was directed.”

PART II.

R r

Upon

Upon reading the writ and the return thereof, it was moved by the King's serjeant, that the same might be affiled of record.

To which serjeant *Glynn* for Mr. *Wilkes* objected, and insisted that the return was too general in this particular case, (although it might be a good return in another case not circumstanced like the present) for that it clearly appeared to the court by sufficient evidence, viz, the affidavit and warrant of arrest and seizure of Mr. *Wilkes*, upon which the writ was founded and granted last *Saturday* at noon, that Mr. *Wilkes* was *then* in the custody of the messengers, and therefore they ought to have returned and certified to the court in *what manner, when and by what authority he was taken out of their custody, and what was become of his body.*

In the case of Sir William Morris who had a ha. cor. for his wife, the return was like the present. The like in Holmes's case for his wife. B. R. about Michaelmas term 1765.

Some of the King's serjeants replied, that all the precedents of returns of writs of *habeas corpus* in the crown-office, where the party therein named was not in the custody of the messengers (to whom the writ was directed) at the time of the coming of the writ, were like the *return* in the present case; which assertion, at first, seemed to have weight with the Lord Chief Justice and two others of the Judges, who thereupon thought the return well enough; but Mr. Justice *Gould* was pleased to say he much doubted, whether the precedents in the crown-office of *returns* to writs of *habeas corpus*, were like the present *return*, as had been asserted by the King's serjeant; and said if the precedents were not so, he should be of opinion, that this was an insufficient return, because he thought, from what appears in evidence in the case, the court has a right to know what is become of the King's subject Mr. *Wilkes*, since he was in the messengers custody last *Saturday* at noon; whereupon (*basilante curia*) the writ and return were not permitted to be affiled of record upon this motion; and precedents were ordered to be looked into, and the matter of the *return* was ordered to be debated at another day; but I never heard that it was.

Afterwards the same *Monday May 2.* a motion was made to the court grounded upon a copy of the aforesaid warrant of commitment of Mr. *Wilkes* to the *Tower*, and an affidavit of the truth thereof, for another *habeas corpus* to be directed to the constable, &c. of the *Tower of London*, which was granted returnable *without delay.*

Tuesday May 3. At the sitting of the court (which was crowded to such a degree as I never saw it before) in the morning Mr. *Wilkes* was brought to the bar, and sat among the serjeants (next to the reporter on his left hand,) when the lieutenant of the *Tower* returned upon this second writ of *habeas corpus* the warrant of commitment of Mr. *Wilkes* to the *Tower* by the two secretaries of state (before set forth), which being read, serjeant *Glynn* moved the court that

that Mr. *Wilkes* might be discharged out of custody without bail, and grounded his motion on three points, two whereof were objections to the legality of the warrant of commitment (the reader will observe that the general warrant of arrest and seizure was not now before the court, and therefore the legality of that could not now be debated), the third point was, that Mr. *Wilkes* was a member of parliament, and therefore was privileged from being arrested for any crime except *treason*, *felony*, and *breach of the peace*, and that supposing him the author of the present supposed libel (which he absolutely denies) it is only a misdemeanor, and none of the three abovementioned crimes or misdemeanors.

The first objection taken to the warrant of commitment was, that it doth not appear to the court that Mr. *Wilkes* was charged by any evidence or information upon oath before the secretaries of state, that he was the author or publisher of the *North Briton*, number XLV. that, for any thing that appeared to the court to the contrary, the secretaries of state committed Mr. *Wilkes* to the *Tower*, upon their own mere imagination or suspicion that he was the author and publisher of this supposed libel.

See 2 Jones
13. Bushel's
case.
2 Inst. 55. a.
Bacon, title
Commitment,
cap. 3.

The second objection taken to the warrant of commitment was, that it was too general, and doth not set forth sufficient, substantial matter, whereupon the court can judge whether the *North Briton*, number XLV. (supposing Mr. *Wilkes* the author and publisher thereof) is a most infamous and seditious libel, tending to inflame the minds and alienate the affections of the people from his Majesty, and to excite them to traiterous insurrections against the government; that the warrant not having set forth the *North Briton*, number XLV. or such parts thereof as the secretaries of state deemed infamous, seditious, &c. the court cannot judge whether any such paper ever existed, it not being before them, or if it does exist, whether it be an infamous libel or not.

In the third place, supposing the warrant of commitment to be good, yet that Mr. *Wilkes* being a member of parliament (which was admitted by the King's counsel) is privileged from arrests in all cases except *treason*, *felony*, and ACTUAL breach of the peace, therefore ought to be discharged without bail; that libels may, and often do tend to the breach of the peace was admitted, and therefore the court of King's Bench frequently grants informations against the authors, printers and publishers thereof; but this is never done but upon affidavits laid before that court ascertaining the said authors, printers or publishers; for surely that matter which only tends to a breach of the peace cannot with any propriety be said to be an actual breach of the peace; and it was said that it is universally agreed, a libel is not an actual breach of the peace, therefore it was insisted

insisted for Mr. *Wilkes*, that upon this point alone (although the others should be over-ruled) he ought to be discharged from his imprisonment in the *Tower*, without bail.

Mr. Serjeant *Hewitt* for the crown, In answer to the first objection said, that it was not necessary to set forth the evidence or information upon which the warrant of commitment was made, in the warrant; but as to the second objection, he admitted that it must appear upon the face of such warrant for what particular *species* of a crime or misdemeanor the party was committed, according to the case of the *King v. Roe and Kendall*, 1 *Salk.* 345. 5 *Mod.* 78. and that in the present case if the commitment had been for writing and publishing a libel *generally*, without specifying the nature and tendency thereof, it would have been *ill*; but here it is said to be “for being the author and publisher of a most infamous and “seditious libel, tending to inflame the minds, and alienate the affections, of the people from his majesty, and to excite them to “traiterous insurrections against the government;” this he thought was a sufficient specification of the nature of the libel, and of the misdemeanor supposed to be committed by Mr. *Wilkes* against the government; but he said he would not be understood to affirm that the paper called the *North Briton*, number XLV. (which was not before the court) was a libel; that he had found no case upon a libel like this, and therefore could not say *what* was a sufficient and precise certainty in a warrant of commitment for a libel, but he thought it not necessary to set forth the whole, or any part thereof, in the warrant.

As to the third objection of privilege, serjeant *Hewitt* admitted that Mr. *Wilkes* was a member of parliament, and could not legally be arrested but for *treason, felony, or breach of the peace*; he cited *Hob.* 215. *Hick's* case, to shew that a libel tends to the breach of the peace; but whether the presumed libel in the present case was a breach of the peace or not, he would not take upon himself to say, nor would he say that the arresting Mr. *Wilkes* in the present case was *not a breach of privilege of the house of commons*.

Serjeants *Whitaker*, *Nares* and *Davy* for the King spoke to the like effect, but none of them affirmed, that the writing or publishing a libel was an actual breach of the peace, (as I understood), or that the arrest of Mr. *Wilkes* in the present case, was not a breach of privilege of parliament, and (I think) they all declined saying any thing more about the privilege of parliament, than what serjeant *Hewitt* had said before. When the King's serjeants had concluded, Mr. *Wilkes* made the following speech to the court.

My

"My Lord! "I am happy to appear before your Lordship and this
 "court, where liberty is so sure of finding protection and support, and
 "where the law (the principle and end of which is the preservation of
 "liberty) is so perfectly understood; Liberty! My Lord! hath been
 "the governing principle of every action of my life; and actuated by
 "it, I always have endeavoured to serve my gracious Sovereign and
 "his family, knowing his government to be founded upon it; but as it
 "has been his misfortune to have employed ministers who have endea-
 "voured to cast the odium and contempt arising from their own ter-
 "rible and corrupt measures on the sacred person of their sovereign and
 "benefactor, so mine has been the daring task to rescue the royal per-
 "son from ill placed imputations, and fix them on the ministers, who
 "alone ought to bear the blame and the punishment due to their uncon-
 "stitutional proceedings; for the proof of my zeal and affection to my
 "Sovereign I have been imprisoned, sent to the Tower, and treated
 "with a rigour yet unpracticed even on SCOTTISH REBELS; but
 "however those may strive to destroy me, whatever persecution they are
 "now meditating against me, yet to the world I shall proclaim, that
 "offers of the most advantageous and lucrative kind have been made
 "to seduce me to their party, and no means left untried to win me
 "to their connection; now, as their attempts to corrupt me have failed,
 "they aim at intimidating me by persecution; but as it has pleased
 "God to give me virtue to resist their bribes, so I doubt not but he
 "will give me spirit to surmount their threats in a manner becoming
 "an Englishman who would suffer the severest trials rather than as-
 "sociate with men who are enemies to the liberty of this country; their
 "bribes I rejected, their menaces I defy, and I think this is the most
 "fortunate event of my life, when I appear before your Lordship and
 "this court, where innocence is sure of protection, and liberty can
 "never want friends and guardians."

Then the court took time to consider, and appointed *Friday* fol-
 lowing to give their opinion, and ordered Mr. *Wilkes* to be remand-
 ed to the *Tower*, and to be brought up again to the bar on *Friday*
 the 6th of *May*; and upon that day, Mr. *Wilkes* being again at
 the bar, the Lord Chief Justice delivered the opinion of the whole
 court.

Lord Chief Justice *Pratt*, after stating the warrant of commit-
 ment, said, there are *two* objections taken to the legality of this war-
 rant, and a *third* matter insisted on for the defendant, is privilege of
 parliament.

The first objection is, that it does not appear to the court that
 Mr. *Wilkes* was charged by any evidence before the secretaries of
 state, that he was the author or publisher of the *North Briton*, num-
 ber XLV. in answer to this, we are all of opinion, that it is not
 necessary to state in the warrant that Mr. *Wilkes* was charged by any
 evidence

evidence before the secretaries of state, and that this objection has no weight. Whether a justice of peace can *ex officio*, without any evidence or information, issue a warrant for apprehending for a crime is a different question; if a crime be done in his sight he may commit the criminal upon the spot, but where he is not present, he ought not to commit upon discretion. Suppose a magistrate hath notice, or a particular knowledge that a person has been guilty of an offence, yet I do not think it is a sufficient ground for him to commit the criminal, but in that case he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon act the official part, by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness, than act as a magistrate. But that is not the question upon this warrant; the question here is, whether it is an essential part of the warrant, that the information, evidence or grounds of the charge before the secretaries of state should be set forth in the warrant? And we think it is not. *Thomas Rudyard's case*, 2 Vent. 22. cannot be applied to this case, for in the case of a conviction it is otherwise. It was said that a charge by witness was the ground of a warrant, but we think it not requisite to set out more than the offence, and the particular species of it. It may be objected if this be good, every man's liberty will be in the power of a justice of peace. But *Hale*, *Coke* and *Hawkins*, take no notice that a charge is necessary to be set out in the warrant. In the case of the *seven bishops* their counsel did not take this objection, which no doubt but they would have done if they had thought there had been any weight in it. I do not rely upon the determination of the Judges who then presided in the King's Bench. I have been attended with many precedents of warrants returned into the King's Bench, they are almost universally like this; and in *Sir William Wyndham's case*, 1 Stra. 2, 3. this very point before us is determined. And *Hawkins* in his 2 Pl. Coron. 120. sect. 17. says, "It is safe to set forth that the party is charged upon oath; but this is not necessary, for it hath been resolved that a commitment for treason, or for suspicion of it, without setting forth any particular accusation, or ground of suspicion, is good;" and cites *Sir William Wyndham's case*, Trin. 2 Geo. Dalt. cap. 12. Cromp. 233. b.

The second objection is, that the libel ought to be set forth in the warrant *in hæc verba*, or at least so much thereof as the secretaries of state deemed infamous, seditious, &c. that the court may judge whether any such paper ever existed, or if it does exist, whether it be an infamous and seditious libel, or not. But we are all of a contrary opinion; a warrant of commitment for felony must contain the *species* of felony briefly, "as for felony for the death of J. S. or for burglary in breaking the house of J. S. &c. and the

" the reason is, because it may appear to the judges upon the return of an *babeas corpus*, whether it be felony or not. The magistrate forms his judgment upon the writing, whether it be an infamous and seditious libel or not at his peril, and perhaps the paper itself may not contain the whole of the libel; *innuendo's* may be necessary to make the whole out: there is no other word in the law but *libel* whereby to express the true idea of an infamous writing; we understand the nature of a libel as well as a *species* of felony; it is said the libel ought to be stated, because the court cannot judge whether it is a libel or not without it; but that is a matter for the *judge and jury* to determine at the trial. If the paper was here, I should be afraid to read it. We might perhaps be able to determine *that it was a libel*, but we could not judge *that it was not a libel*, because of *innuendo's*, &c. It may be said that without seeing the libel we are not able to fix the *quantum* of the bail; but in answer to this, the nature of the offence is known by us; it is said to be an infamous and seditious libel, &c. it is such a misdemeanor as we should require good bail for, (moderation to be observed) and such as the party may be able to procure.

The third matter insisted upon for Mr. *Wilkes* is, that he is a member of parliament, (which has been admitted by the King's serjeants) and intitled to privilege to be free from arrests in all cases except *treason, felony, and actual breach of the peace*, and therefore ought to be discharged from imprisonment without bail; and we are all of opinion that he is intitled to that privilege, and must be discharged without bail. In the case of the seven bishops the court took notice of the privilege of parliament, and thought the bishops would have been intitled to it if they had not judged them to have been guilty of a *breach of the peace*, for three of them, *Wright, Holloway, and Allybone*, deemed a seditious libel to be an actual breach of the peace and therefore they were ousted of their privilege most unjustly. If Mr. *Wilkes* had been described as a member of parliament in the return, we must have taken notice of the law of privilege of parliament, otherwise the members would be without remedy where they are wrongfully arrested against the law of parliament; we are bound to take notice of their privileges as being part of the law of the land. 4 *Inst.* 25. says, the privilege of parliament holds unless it be in three cases, *viz. treason, felony, and the peace*; these are the words of *Coke*; in the trial of the seven bishops the word *peace* in this case of privilege is explained to mean where surety of the peace is required. Privilege of parliament holds in informations for the King, unless in the cases before excepted; the case of an information against Lord *Tankerville* for bribery, 4 *Annæ*, was within the privilege of parliament. See the resolution of the Lords and Commons, *anno* 1675. We are all of opinion that a libel is not a breach of the peace; it tends to the breach of the peace,

peace, and that is the utmost. 1 Lev. 139. but that which only tends to the breach of the peace cannot be a breach of it. Suppose a libel be a breach of the peace, yet I think it cannot exclude privilege, because I cannot find that a libeller is bound to find *surety of the peace*, in any book whatever, nor ever was, in any case, except one, viz. the case of the seven bishops, where three Judges said, that *surety of the peace* was required in the case of a libel; Judge Powell, the only honest man of the four Judges, dissented, and I am bold to be of his opinion, and to say that case is not law; but it shews the miserable condition of the state at that time; upon the whole, it is absurd to require surety of the peace or bail in the case of a libeller, and therefore Mr. Wilkes must be discharged from his imprisonment, whereupon there was a loud *buzza* in Westminster-hall. He was discharged accordingly.

Leeman *versus* Allen and others. C. B.

Imprisonment for a few hours, 300*l.* damages not excessive, and new trial refused.

Verdict not set aside for a variance between the issue delivered and the record of *nisi prius* after a defence.

TRESPASS, assault and imprisonment, to the plaintiff's damage of 300*l.* The defendant pleaded the general issue; upon the trial the jury gave a verdict for the plaintiff, and 300*l.* damages; in the paper book of the issue, delivered to the defendant with notice of trial, the damages (by mistake) were laid on 200*l.* but the record of *nisi prius* was right and agreeable to the roll, which was 300*l.* damages; after a defence made at the trial, it was now moved by serjeant Neres for the defendants to set aside the verdict upon two matters, 1st, because there is a variance between the issue book delivered; and 2d, because the damages are excessive.

It appeared in evidence at the trial, that the plaintiff kept the *Rummer* tavern in *Chancery-Lane*; that the defendants are persons called reforming constables, and under pretence of a warrant from one *Kinaston*, a justice of peace, entered the plaintiff's house with staves, there seized and carried her into the yard, and said, "*now we have got her, and will carrie the bitch to new prison*;" the defendants would not say what crime she was guilty of, or charged with; *Allen* the constable had a warrant, but he did not shew it; that the next morning the plaintiff went to Mr. *Kinaston*'s house, but he was not at home; then she went to justice *Cox*'s, and again to Mr. *Kinaston*'s but none of defendants appeared to prosecute her. *John Slade*, the waiter at the tavern, proved, that a man and a woman came to plaintiff's house (who looked like fellow servants) between 9 and 10 o'clock one evening in *Easter* week, a few minutes before this imprisonment was done; that they appeared to be honest sober persons, and came to refresh themselves; that he saw the defendants armed with bloodgeons, take and seize the plaintiff his mistress; that *Allen* laid hold of her, and said, "*Now damn you for a bitch*"

"we have got you, and we are determined you shall go to New prison;" other witnesses gave evidence to the like effect; that these defendants called themselves reformers; about 20 witnesses proved the *Rummer* tavern to be a house of good repute, and no body proved the contrary; it was also proved that one of the defendants struck the plaintiff. That the defendants never prosecuted the plaintiff, nor did they appear against her when she went before the justice next day. For the defendants, one *William Gardiner*, who was accidentally present in court at the trial, swore he was at the *Rummer* when this affair happened, and that he heard no oaths, nor the word *bitch*, &c. It appeared that the warrant was granted and signed by justice *Kynaston*, to enter this house, upon an allegation that the plaintiff kept a lewd and disorderly house; that they had two warrants, one for *London*, and another for *Middlesex*, because this house stands partly in and out of the city, which they kept five weeks before they executed them; that they frequently watched the house, and when they imagined any lewd persons went into the house they took that opportunity to execute the warrant; this is the substance of the evidence, whereupon the jury found for the plaintiff, and 300 *l.* damages.

Chief Justice: 1st, As the defendants made a defence at the trial, the court will not set aside the verdict for the variance between the issue book delivered in paper; and the record of *nisi prius*, which was not mentioned or objected to, at the trial; and if the record of *nisi prius* had been wrong, the court would have mended it by the roll, after a verdict and a defence made.

2. As to the excessiveness of damages; courts should be very cautious how they overthrow verdicts that have been given by 12 men upon their oaths; however, if damages be unreasonable and outrageous indeed, as if 2000 *l.* or 3000 *l.* was to be given in a little battery, which all mankind might see to be unreasonable at first blush; certainly a court would set aside such a verdict, and try whether a 2d jury would not be more reasonable. The rule in the case of *Ash and Ash, Comb. 357.* laid down by Lord *Holt*, is a good one; "That the jury are to try causes with the assistance of the judges, and ought to give their reasons, when required, that if they go upon any mistake they may be set right;" and for their not doing so, and for excessiveness of damages, a new trial was granted. And this rule is universal, and extends to all sorts of actions. But it may be said what rule has the court to govern themselves by as to matters of *tort*? I answer, the court must be able to say the damages are beyond all measure unreasonable, though they cannot say exactly what damages ought to be given. I do not think the damages excessive in the present case; here are a number of persons like a new sort of grand jury, who meet once or twice in a week,

and take upon themselves to present, correct, reform, and commence prosecutions; a warrant is granted by *Kynaston* a reforming justice, on the information of one *Tristram*, who is fled for an abominable crime, there was no account given at the trial of the matter of his information to *Kynaston*, who did not appear though he was *subpœned*, the warrant is pocketed five weeks, the defendants watch and wait till they can dodge a lewd woman into the out-rooms of this house, where they had not been five minutes, before the defendants entred with bludgeons, and seized upon the person of the plaintiff, and would have carried her to prison that night, if her neighbours had not then interposed and undertaken that she should appear before justice *Kynaston*, next morning, which she did, but the defendants never pursued the warrant one step farther. I think the King's Bench would grant an information against these persons for setting themselves up as a kind of grand jury; an informer is a most odious character; and I am glad of an opportunity of declaring my dislike towards these reformers. The whole court refused to set aside the verdict; and the plaintiff had judgment.

Roe on the demise of Ashton *versus* Hutton and others. C. B.

6 B. & A. 336. 1 B. & A. 736

Copyhold surrendered to the use of a will, is devised to six persons, one offers to be admitted, the lord refuses to admit him, the lord cannot seize quousq; &c.

EJECTMENT of copyhold lands, tried at *Lincoln*, verdict for the plaintiff, subject to the opinion of the court, upon the following case.

The *Dean and Chapter of Peterborough* being seised of the manor of *D.* by lease dated the 21st of May 1759. demised the same (to one *Ch. Astroppe* who died 21 May 1760. and) to the lessor of the plaintiff for 21 years; afterwards, one *Martin* being tenant of the copyhold lands in question, surrendered to the use of his will; and thereby devised the same to *John Hutton*, and five other persons in trust, &c. and died. *John Hutton* went to the Lord's Court, and desired to be admitted tenant, upon paying his proportionable part of the fine, but the Lord refused to admit him, unless he would pay the whole fine for himself and all the other five trustees, which he refused; another of the trustees appeared in court, but refused to be admitted upon any terms at all; the other four never appeared in court, and sent word by these two, that they dissented, and would not be admitted; whereupon three proclamations were made for all the six trustees to come and be admitted, or the whole land would be seised into the lord's hands as forfeited, and afterwards the Lord entered for the forfeiture supposed; this is the title of the lessor of the plaintiff.

The whole court held that the Lord ought to have admitted *J. Hutton* who offered himself, and then the Lord might have proceeded to recover his fine for all the six trustees, if it was either due by law or the custom of the manor, and he has been too hasty in entring for a supposed forfeiture before admittance, a seizure *quousque* is until somebody comes to be admitted, one comes and offers to be admitted; so it is clear the Lord had no right to seize. Judgment for the defendants.

Tho. Raym.
41, 42.

Latch 14.
Johnson's
case.

3 Lev. 308,
309.

Styles 141.
Lit. Rep. 262.

Palmer versus Johnson. C. B.

TRESPASS for cutting down the plaintiff's trees at *Branton* common in the county of *Huntingdon*; upon not guilty, there was a verdict for the plaintiff, subject to the opinion of the court, upon a case reserved, the short state whereof is as follows; At the trial the plaintiff, in order to prove he was in possession of the place in which, &c. produced in evidence a paper writing purporting to be an admission of the plaintiff to the place in question as being copyhold, in trust for *J. S.* by the lord of the manor of *B.* It was stated that the trees were cut down on *Branton* common by the defendant, and that the plaintiff himself was not a commoner, but was a trustee for *J. S.* who has a right of common.

In a case for the opinion of the court the facts proved at the trial ought to be stated, and not the evidence of facts only.

Serjeant *Foster* for the plaintiff.

The question is, whether the plaintiff being a trustee for *J. S.* who is a commoner, can maintain trespass against the defendant for cutting down trees there; and unless the plaintiff in this case has trespass, none else has, *Cro. Eliz.* 349. *Coke's Copyb.* 70. it was objected at the trial, how could the plaintiff call the trees *his trees*; in answer to this *Bro. tit. Tenant per Copy, p. 2.* tenant at will of a copyhold brought trespass for cutting trees, and he had damages and judgment although there be another frank-tenant, *quod nota* says *Bro.* and cites 2 *H. 4.* 12. and 12 *Mod.* 379. is trespass by a copyholder against the Lord. Suppose this had been a feoffment to uses at the common law, the action of trespass must have been brought by the feoffees. *Hil. 15 H. 7. fo. 2. pl. 4. cestuy que use* cannot distrain in his own name. *Gilb. Ten.* 180. the statute of uses does not extend to copyholds, so the plaintiff is to be considered as a feoffee to uses at common law.

Serjeant *Whitaker* for the defendant.

Upon the trial of this cause there was neither proof of title or possession in the plaintiff, of the place in question, nor does the case state any fact of title or possession in the plaintiff, it only states that

a paper writing importing to be an admission of the plaintiff in trust, *Ec.* was proved, but this does not prove that the estate is copyhold, it is only presumptive evidence that it is copyhold, the fact that the place in which, *Ec.* was copyhold ought to have been stated; so that neither of the facts that the plaintiff had *title* or *possession* are stated and therefore the plaintiff cannot have this action; and of that opinion was the court, and set aside the verdict, but without costs.

2 Rol. Abr.
553. S. pl. 1.

Anson *versus* Jefferson. C. B.

An attorney appearing on the face of the entry to have cast an *essoins* for a defendant, it is void.

THIS was a plaint in replevin levied in the county court of Norfolk, which was removed by the plaintiff into the C. B. by a *recordare facias loquelam*, returnable on the morrow of the purification of the blessed Mary; the plaintiff sued out a *pone* to compel the defendant to enter his appearance, but instead of appearing, he (by attorney) cast an *essoins*, which is entered with the clerk of the *essoins* in the following words, viz. "On the morrow of the purification of the blessed Mary, Norfolk, *essoins* for John Jefferson at the suit of Anson by Henzell and Lodge;" and the defendant's attorney Mr. Lodge entred a rule, that unless the plaintiff should adjourn the *essoins* a *non pros* would be signed; the plaintiff did not adjourn the *essoins*, so a *non pros* was signed; upon shewing cause why the *essoins* and the *non pros* should not be set aside, it appeared upon affidavit that Henzell and Lodge were agents or attorneys for the defendant, and had entred, or cast the *essoins*, and therefore it was insisted that the defendant was in court by his attorney; and it would be absurd to say a man can *essoins* when he really appears by attorney, or that he has a legal excuse for not appearing when it is plain he has acted in the cause by his attorney. It was also said that no *essoins* lies in personal actions, *Symonds v. Mayor of Totness*, *Sir. Geo. Cooke's cases of practice* 8. In the case of *Barclay v. Earle*, B. R. 2 Stra. 1194. The defendant being sued by original, and arrested on a special *capias* cast an *essoins*, and for want of the plaintiffs adjourning it, signed a *non pros*; the court declared there was no colour for the *essoins*, and though the plaintiff had proceeded to judgment after he was *non pros'd* for not adjourning the *essoins*, yet the court would not set aside the judgment, notwithstanding it was alledged that the plaintiff was out of court, as the *non pros* had never been set aside.

Pratt Lord Chief Justice, I cannot say that *essoins* may not be allowed in personal actions, because *Coke* in 2 *Inst.* on the *Stat. of Marlbridge*, fo. 125, 126, 137. says that *essoins* are allowed in personal actions; but this is a very obsolete practice, and a great abuse of the law, as it is an unnecessary delay of justice; and if the practice is to be revived, it will be necessary to make a new order of court.

Bathurst

Bathurst Justice: By the statute of *essoins*, 21 Ed. 2. sec. 12. An attorney may essoin, but if seen in court he cannot. an essoin lieth not where the party hath an attorney in his suit; and by sec. 4. an essoin lieth not where the party was seen in court. An essoin lies for an attorney though he is an officer of the court, but if he be seen in court he cannot essoin, as was the case of Mr. George Wheeler, who was secondary to prothonotary John Borrett, Esq; and an attorney, and attended the holding the essoin upon the essoin-day of the same term, wherein he essoined. Lord Chief Justice: It was said, the *pone* was a summons, and therefore the defendant might well essoin; but it is not so, it is only a prefixing of the day for the defendants to appear at Westminster; here is an attorney appears to have entred the essoin, and therefore it is void, and must be set aside, and all proceedings thereon.

Trinity Term

3 Geo. 3. 1763.

Freeman on the demise of Vernon alias Bund *versus*
West. C. B.

EJECTMENT of a toft and certain lands in Charlton in the parish of Cropthorne in the county of Worcester, tried at the last summer assizes before Mr. Baron Smythe, when a verdict was found for the plaintiff, subject to the opinion of the court upon this case, (*viz.*) It appeared in evidence that the dean and chapter of Worcester were seised in right of their church of one of the manors of Charlton in the said parish of Cropthorne, and being so seised, by indenture bearing date the 26th day of November 1750. between the dean and chapter of the one part, and the plaintiff's lessor of the other part, the dean and chapter for a valuable consideration granted the said manor of Charlton (of which the premises in question are part) to the plaintiff's lessor, to hold to him and his heirs from the day of the date thereof, for the lives of three persons who are still living, under the yearly rents therein

A lease for lives to begin from the day of the date thereof and seisin delivered afterwards is good, and shall not be said to convey a freehold to commence in futuro.

PART II.

U u

reserved;

reserved; and in the lease power is given by the dean and chapter to *William Bund* as their attorney, to take possession of the premises, and to deliver seisin thereof to the plaintiff's lessor, according to the tenor, effect and true meaning of the said lease; in pursuance of which power, *seisin* was delivered of the premises by the said *William Bund* to the plaintiff's lessor on the 28th day of *May* 1751.

It was objected on behalf of the defendant, that this is a lease of a freehold, and being made to commence *in futuro*, is therefore void.

The question for the opinion of the court is, whether this lease, as it is made to commence from the day of the date thereof, and seisin being afterwards delivered on the 28th day of *May* following, is good or not?

This case was twice argued at the bar, in *Easter* term last by serjeant *Nares* for the defendant, and serjeant *Hewitt* for the plaintiff; and in this present term, by serjeant *Aspinal* for the defendant, and serjeant *Eurland* for the plaintiff; after time taken to consider, the Lord Ch. Justice delivered the opinion of the whole court, and gave judgment for the plaintiff.

Lord Ch. Justice *Pratt*: We must not overthrow established principles of law; that a *freehold* cannot be conveyed to pass *in futuro*, is a certain principle, and was grounded on the feudal law; for if a *freehold* could pass to commence *in futuro*, there would be an *abeyance* and want of a tenant against whom to bring a *præcipe*, and the law will not suffer the land to be in *Abeyance* a single day, if possible, to prevent it, for if it might be without a tenant of the freehold for one day, why not for a year, or 50 years: Indeed, at this day, there is not such absolute necessity that there should be an actual tenant of the freehold, as formerly when real actions were the only way of trying titles to land, and which *real writs* can only be brought against the tenant of the *freehold*, because at this time, and for 200 years past, the fictitious action of *ejectment* against the tenant in possession is, and has been the universal practice of trying titles to lands and tenements; and therefore if ever there was a case where the *astutia* of judges (to overlook niceties in the law, and to get over difficulties of first principles which stood in their way,) was commendable, this is *that* case. The old principle of law, that a *freehold* cannot pass to commence *in futuro*, has no good reason or ground to stand upon at this day; but without saying any thing against that old law, we may in this particular case, with the authority of our forefathers, determine this to be a good lease.

The

The objection to it is not much to be favoured ; it is to overturn a deed made upon good consideration ; it would make void a great number of church leases, which are penned in the same way, and occasion much inconvenience ; *ut res magis valeat quam pareat* is a good ground for us to stand upon ; and therefore we are of opinion with the case in *Moor* 637, 759. that the *freehold* remained in the *dean and chapter* after the date and making of the lease, and until *seisin* was delivered by the attorney to the plaintiff's lessor, according to the tenor, effect and true meaning of the said lease, and then, and not before, the *freehold* passed out of the *dean and chapter* to the plaintiff's lessor. The *livery of seisin* is the only powerful operative transaction, for if, in this case, nothing had been said of livery, either *in*, or *dehors* the deed, nothing would have passed by the lease till the day of judgment. Courts have determined that if livery be made by the lessor himself after the date in the deed, it shall controul the express day in the deed, and make such a lease as this, (*habendum a die datús*) good; what difference therefore can there be between this, and when it is done by the lessor's attorney, according to the tenor, effect and true meaning of the lease, six months after the date, as is stated? No difference at all. *Vide Palm.* 30 *Dean and Chapter of Worcester's* case there cited, was a lease for life to commence *a die datús*, and a letter of attorney to make livery the next day, which was made accordingly, and adjudged a good lease. By the warrant of attorney to deliver *seisin* in the present case, the intention of the parties was, that the deed should be substantiated by the livery, and in the mean time the freehold was in the grantor; so that without saying any thing against the old law, that a *freehold* cannot pass to commence *in futuro*, we give judgment for the plaintiff, and order the *possea* to be delivered to him.

3 B. & C. 156

Cases cited by serjeant *Nares* upon the first argument. 1 *Ld. Ray.* 84. 3 *L. v.* 438. *Salk.* 413. 1 *Ro. Rep.* 229 *Hob.* 314. 2 *Bulst* 304, 5, &c. 2 *Rep.* 55.

Cases cited by serjeant *Hewitt.* *Co. Lit.* 52. b. 48. b as to feoffment and *seisin.* *Moor* 636. *Ro. Rep.* 402. By judge *Bathurst.* *Palm.* 30. *Cro. Jac.* 153.

Cases cited by serjeant *Burland.* *Perk. sec.* 187. 1 *Ro. Abr.* 828. in point. *Cro. Jac.* 153, 563. *Hob.* 314. margin. 3 *Rep.* 55. By serjeant *Aspinwall,* 30 *Ed.* 3. 31, &c.

N. B. The court said they would presume that the power given to the attorney was to make *livery* at any day subsequent to the lease; which they said was the true meaning of the deed.

N. B.

N. B. Mr. Justice *Wilmot*, at a trial of an ejectment formerly upon this same lease, was of opinion that *from the date*, and *from the day of the date*, was the very same, and both included the day. *Vide* *Ld. Raym. Kello and May, contra Ld. Coke.*

N. B. Mr. Baron *Smythe* at the trial was of the same opinion with the Common Pleas, and that the lease was good for the same reasons nearly.

French qui tam, &c. *versus* Adams. C. B.

A man may
exercise as
many trades
as he has
worked at or
served to
seven years.

THIS was an action of debt upon the *stat. 5 Eliz. cap. 4. s. 31.* against the defendant for exercising the trade of a *carpenter*, contrary to the statute, he not having served an apprenticeship to that trade; issue was joined upon *nil debet*, and tried before Lord Chief Justice *Pratt* at *Westminster*. It appeared in evidence at the trial, that the defendant had worked or served as a servant for seven years in the trade of a *glazier*, and for some time afterwards exercised that trade as a master; that afterwards he exercised the trade of a *carpenter* for the space of nine years, and it was proved that he well understood that trade.

It was objected by serjeant *Nares* for the plaintiff at the trial, that the defendant being originally first bred up to the trade of a *glazier*, he could not now follow two trades, both *carpenter* and *glazier*; and whether he could or not, was the question reserved for the consideration of the court.

Curia. All the judges of *England* at a meeting lately resolved, That if any man as a master had exercised and followed any trade as a master without interruption or impediment for the term of seven years, he was not liable to be sued or prosecuted upon the statute of the *10th of Eliz.* Also if a man hath followed two or more different trades for the term of seven years, or more, he shall not be liable to be sued or prosecuted upon this statute. There is no law against one man's following several trades at this day; there was an ancient statute made the *37 Ed. 3. cap. 6.* That artificers or handicraftsmen should use but one mystery, and that none should use any mystery but *that* which he had before that time chosen and used; but this restraint of trade and traffick was immediately found prejudicial to the commonwealth, and therefore, at the next parliament, it was enacted, that all people should be as free as they were at any time before the said ordinance. *11 Rep. 54. a.* And *Coke* says, it is to be observed, that acts of parliament that are made against the freedom of trade, merchandizing, handicrafts, and mysteries, never live long. *4 Inst. 31.* Without the least doubt in the court,

a man may follow twenty trades if he has worked at, or followed each trade seven years; *Mr. Harrison of Red-Lyon-Square*, served an apprenticeship to the trade of a *carpenter*, but, for twenty-six years he has been a watch-maker, and though he never served as an apprentice to the trade of a watch-maker, is the best maker of time-pieces in the world, and the parliament has given him 5000 *l.* towards finding out the longitude by the help of his watches or time-measurers; and shall this man be hindred from making watches, and exercising the trade of a carpenter also if he pleases? *Per totam curiam*, There must be judgment for the defendant, and the *Posse* must be delivered to him. Serjeant *Nares* for the plaintiff, serjeants *Burland and Glynn* for the defendant.

Port Esq; *versus* Turton & al', assignees of Sparrow
a bankrupt. C. B.

TROVER for a certain quantity of coals; upon *Not guilty* there was a verdict for the plaintiff, subject to the opinion of the court; upon the following case made at the assizes.

J. S. in consideration of 1600*l.* grants, bargains and sells to *Sparrow*, his executors, administrators, and assigns, a certain mine of coals, reserving a rent and a certain quantity of coals to be delivered to the said *J. S.* every year, with power of re-entry in case of non-payment; there is no limitation of *time* or *term*, but it is a sale and purchase of the whole mine so long as any coals are to be gotten therein; *Sparrow* worked the mine and sold the coals, and then committed an act of bankruptcy; afterwards 13 Oct. 1761. he assigned all the coals he had got to the plaintiff; the defendants as assignees of *Sparrow*, under a commission of bankruptcy claimed and took away the coals, and whether the buying the coal-mine, working it and selling the coals, can make him liable to be a bankrupt within any of the statutes concerning bankrupts, was the question.

1033.6/33
One who
buys a coal
mine, works
it and sells
the coals is
not a trader
with in th:
a trustee of
bankrupt.

Serjeant *Davy* for the defendants: *Sparrow* is a buyer, and not a farmer; I admit the buyer of an estate is not a trader, but the buyer of part of the profits of an estate, if he sells the same again and endeavours to get his living thereby, is a trader; as suppose a man upon the exchange buys the produce of a plantation, all the *cane*s which shall grow upon it next year, and sells the same; or a timber-merchant buys wood growing, and sells it. Or the like as to hops, corn, &c.

Chief Justice: When he buys the timber, the corn, &c. standing, what does he buy, something real or personal?

Davy: When one buys as much coal as he can get in a certain field, it is a personal thing in the buyer.

Gould Justice: Would not an ejectment lie for this?

Chief Justice: Most certain, an ejectment would lie.

Davy: Sparrow did not buy the mine, only the profits of it.

Chief Justice: It is a *chattel interest* in the land, and would go to executors.

Davy. December 19, 1707. Lord Cowper determined that a buyer of coals in the mine is not a trader within the statutes of bankrupt, but if he sells them together with others that he bought at market, then he becomes a trader within the statutes of bankrupt.

July 1757. *Newton and Newton*; A buyer or farmer of allum works cannot be a bankrupt; held *per Lord Mansfield*.

Chief Justice: How many witnesses are requisite to a will of this interest in the coal mine? Three, certainly; it being an interest in land. Before the statute of Geo. 1. c. 24. it was a doubt whether a farmer could be a bankrupt; now by that statute it is clear that he cannot. I think we can have no doubt in this case; and that we have no occasion to hear my brother Nares on the other side, unless it is desired to be argued a second time; I never was so clear in any case in all my life, as that Sparrow was not a trader liable to bankruptcy.

Uncertain interests go to executors.

This interest in the coal mine is a chattel, it is quite an uncertain interest, because no body can tell how long coals can be got; it is like an estate by *elegit*, or *statute staple*, which lasts as long as the debt is not wholly satisfied; so this interest will last as long as there are any coals to be had. A mine is a temporary interest in the land, yet still it is a chattel interest, and will go to executors; for it is a certain rule, that uncertain interests always go to executors, they can go no other way, if undisposed of by will.

Gould Justice, having some little doubt, the plaintiff's counsel were ordered to go on,

Serjeant

Serjeant Nares for the plaintiff.

1st, This is a bargain and sale of all the mine, described to be staked, and marked out with boundaries, with a clause of re-entry in the feller, in case of non-payment, &c. *Mines* are things of inheritance, and cannot possibly be deemed merchandize, so that a trader or dealer in *mines* can never be deemed liable to bankruptcy. 2 *Wms.* 240, 1, 2. *Ejectment* lies of *mines*, 2 *Stra.* 1142. a fine may be levied of *mines*, *tit. De conventionione* in the *Regist.* 165. *b. Shep. Touchstone* 10. *Brown's Fines* 15.

Chief Justice: A Fine may be levied of water-works, and a recovery may be suffered of every thing whereof a fine may be.

Nares 2^{dly}, He who is liable to be a bankrupt must be "a person using the trade of merchandize by way of bargaining, exchange, bartering, chevissance in gross or by retail, or seeking his living by buying and selling". See *stat. 13 Eliz. c. 7. 1 Jac. 1. c. 15. 21 Jac. 1. c. 19.* It surely is not merchandize to buy a coal mine, no more than it is to buy any other estate, or chattel interest in land whatever.

Ld. Chief Justice: The single question is, whether *Sparrow* can be deemed to be a trader within the true meaning of any of the statutes made concerning bankrupts; I am very clearly of opinion he cannot; the statute of 21 *Jac. 1. cap. 19.* is the ruling statute whereby this matter must be determined: the person who shall be deemed a bankrupt is thus described, *viz. 1st*, He must be a person using trade of merchandize, &c. Or, 2^{dly}, One seeking his living by buying and selling; by buying and selling what? Surely, not by buying an interest in land, and selling the profits thereof; this can never come within the *idea* of using the trade of merchandize, or getting a living by buying and selling in the sense of the legislature; from the *idea* we have of merchandize, the line may be drawn between the land owner, and the merchant; one would wonder there could ever have been any doubt about a farmer; for if every buyer and seller was liable to be a bankrupt, many of the first persons in the kingdom might be liable to be so: whatever the owner of land in fee may do, surely, he who rents it may do the the same; if the former may be a buyer and seller, and not be liable to be a bankrupt, why may not the farmer be so also? his tilling the land, husbandry and stock on his farm, are known to every body, yet he seeks his living by buying and selling; so an *innkeeper*, a *vi^{ct}ualler*, and an *alehousekeeper*, get their living by buying and selling, but their way of buying and selling is not within the meaning of any of the statutes of bankrupt; the buying and selling which is within those

those statutes is to be confined to persons who live by a credit gained on an uncertain capital stock.

The case at bar is this: One buys, another sells so many feet of coals, to the buyer his executors and administrators, for a gross sum; the buyer works the mine and sells the coals; and now it is said he uses merchandize, because he is a coal master; but I think there is no difference between a lease for years and this case of the coal-mine; *Sparrow* clearly had a chattel interest in the land, like an *elegit*, as was said. Though a *mine* be an inheritance, yet it may be severed from the inheritance by the grant now made; but it is certainly an interest in the land; if it is not so, how is it to be considered or received? There is no doubt but an ejectment will lie of it, that a fine may be levied of it, and that a will of it requires three witnesses; things annexed to the land while standing and inherent in it, as trees, lead, coals, &c. while they are so, are real estate and inheritable, but as soon as severed they are personal estate; while a *coal mine* is undug it is part of the inheritance; a *gravel pit* granted would be a chattel interest in the land until it was worked out, and if the grantee were interrupted in working it, he could have nothing but trespass. If *Sparrow* was neither the farmer, nor owner of this *coal mine*, what was he? he must be one or the other; and neither the owner or farmer of an interest in land by buying and selling the same, or profits thereof, are liable to bankruptcy; the case of the *allum works* is much stronger than this; the case of a *brickmaker* is a very different, the earth is manufactured and turned into quite another thing, but coals carried to market are the same as they were found in the earth; upon the whole it is impossible to make this man a trader within the meaning of the statutes concerning bankrupts.

Clive: I am of the same opinion; if the owner of a colliery sells coals, he cannot be a bankrupt; *per Lord Sommers*.

Bathurst: I am of the same opinion.

Gould: I am of the same opinion as at present advised, but am not against having the matter argued a second time, if the parties desire it.

But it never was argued again that I have heard of, so that the plaintiff must have entered his judgment upon the verdict, which was for him.

Hawkins, Esq; *versus* Wallis, Esq; C. B.

TRESPASS for nailing trees up against the plaintiff's wall;
Not guilty pleaded; verdict for the plaintiff, subject to the
opinion of the court upon this short case.

Trespass.
Whoever
claims an
easement must
plead it spe-
cially.

The facts at the trial were, that the plaintiff was possessed of a certain greenhouse, the backwall whereof adjoined to the defendant's close, and that the defendant nailed the trees growing in his close to the wall of the plaintiff's greenhouse, which was the absolute property of the plaintiff, and that the defendant had used so to nail his trees to the same wall for 30 years last past, without interruption; it was insisted that this long usage was a possession of the back part of the wall in the defendant, though the property of the wall was in the plaintiff. But *per curiam*, It was resolved that this was no possession in the defendant, but an *easement* only, and cannot be given in evidence upon the general issue; for whoever claims an *easement* must plead it specially; and judgment was given for the plaintiff. *Gould J.* Suppose the wall falls down, it being the plaintiff's property and fence next to defendant's close, the plaintiff must rebuild it, or the defendant might have an action against him.

Anonymus. C. B.

DEBT on a bond with condition to pay a certain sum of money *on or before such a day*; the defendant craves *oyer* of the bond, and sets forth the condition, and pleads payment of the money before the day, to wit, that he paid it on such a day; the plaintiff demurs, and defendant joins in demurrer.

Debt on a
bond to pay
money on or
before such a
day, payment
before the
day, scilicet,
such a day, is
good.

Burland for the plaintiff objected, that the defendant ought not to have put in issue the particular day whereon he paid the money, but ought to have pleaded that he paid the money on or before the day. But *per curiam*, The defendant has pleaded that he paid the money *before* the day, according to the condition, which is in the disjunctive, to pay *on or before* the day; and the demurrer admits the plea to be true, and confesses the money was paid before the day, so the defendant must have judgment; but the plaintiff moved for leave to withdraw his demurrer, and to reply, upon payment of costs; which was granted.

Cro. Jac. 434.

Wolferstan *versus* The Bishop of Lincoln and Whitehead, clerk. C. B.

Quare impedit.

The record is entered of Michaelmas term in the second year of the present King.

QUARE impedit to permit the plaintiff to present to the north mediety of the church of *Great Sheepy* in the county of *Leicester*, the plaintiff's title set forth in the declaration is, that *Elizabeth Vincent*, widow, was seised in fee of the advowson of the north mediety of the said church in gross, and being so seised, presented *William Vincent* her clerk to the same, it being vacant, who was thereupon admitted, instituted and inducted thereto; and the said *Elizabeth* being so seised, and the said north mediety being full of the said *William Vincent*, she (*Elizabeth*) on the first day of *May* in the year of our Lord 1722. died seised of such her estate in the advowson, upon whose death the same descended to the said *William Vincent* her son and heir, whereby the said *William* was seised thereof in gross in fee; and he being so seised, and being so incumbent of the said north mediety, afterwards on the 1st day of *October* 1740. made his will in writing, and thereby devised the said advowson unto *Elizabeth Vincent* and *Hannab Vincent*, spinsters, his daughters, and their heirs, equally to be divided between them; and afterwards on the first day of *March* 1740. died seised of such his estate in the said advowson, and incumbent of the north mediety of the said church, upon whose death the said *Elizabeth* and *Hannab Vincent*, spinsters, by virtue of the said devise, became and were seised of the said advowson in gross in fee; and the said north mediety of the said church became vacant by the death of the said *William*; and the said *Elizabeth* and *Hannab Vincent*, spinsters, being so seised, and the said north mediety of the said church being vacant by the death of the said *William*, it belonged to the said *Elizabeth* and *Hannab Vincent*, spinsters, to present a fit person to the said north mediety of the said church so vacant, and one *Hannab Vincent*, widow, usurping upon the said *Elizabeth* and *Hannab Vincent*, spinsters, presented to the said north mediety of the said church so vacant *Silvester Vincent* her clerk, who upon the presentation of the said *Hannab Vincent*, widow, was admitted, instituted and inducted thereunto; and the said *Elizabeth* and *Hannab Vincent*, spinsters, being so seised of the said advowson, to wit, the said *Eliz.* of one undivided moiety thereof, and the said *Hannab Vincent*, spinster, of the other undivided moiety thereof, she the said *Elizabeth Vincent*, spinster, afterwards, to wit, on the 22d day of *January* 1757, at *Great Sheepy*, by an indenture then and there made between *Thomas Gresley* Gent. of the first part, the said *Elizabeth Vincent*, spinster, of the second part, *Sir Nigell Gresley*, Bart. and *Francis Vincent*, Esq; of the third part, and *Silvester Vincent*, clerk, of the fourth part, (the second part of which indenture sealed with the seal of the said *Elizabeth Vincent*,

usurpation stated

134d. 538
72d. 209

Burr. 1504
aff in law

note 2. Luthw. 1302.

Vincent, spinster, the said plaintiff now brings into court) in consideration of a marriage then intended between the same *Elizabeth* and the said *Thomas Gresley*, she did grant to the said Sir *Nigell* and *Francis* her undivided moiety of the said advowson of the north mediety of the said church; to hold to them and their heirs, to the use of the said *Elizabeth* in fee, until the said intended marriage, and from and after the said marriage, to the use of the said *Elizabeth* for her life, and from and after the determination of that estate to the use of the said Sir *Nigell* and *Francis* and their heirs during the life of the said *Elizabeth*, and from and after the decease of the said *Elizabeth* to the use of the said *Silvester Vincent*, his executors, &c. for the term of 200 years; and from and after the determination of the said term to the use of the said *Thomas Gresley* for his life, and from and after the decease of the survivor of the said *Elizabeth* and *Thomas Gresley* to the use of the said Sir *Nigell* and *Francis* and their heirs for ever; which said marriage afterwards on the first day of *March*, in the year last mentioned at *Great Sheepy* was had, whereby and by virtue of the said deed, and by force of the statute for transferring uses into possession, the said *Thomas Gresley* and *Elizabeth* his wife, became and were seised of the said moiety of the said advowson in right of the said *Elizabeth* as of freehold, for the term of her life, the remainder belonging to the said Sir *Nigell* and *Francis* and their heirs during the life of the said *Elizabeth*, the further remainder, thereof belonging to the said *Silvester Vincent*, his executors, &c. for the term aforesaid, the further remainder thereof belonging to the said *Thomas* for his life, and the ultimate remainder thereof belonging to the said Sir *Nigell* and *Francis* and their heirs; and the said *Thomas* and *Elizabeth* being so seised of the said undivided moiety, the remainder thereof belonging as aforesaid, and the said *Hannab Vincent*, spinster, being so seised of the said other moiety, the said north mediety of said church became vacant by the death of the first abovementioned *Silvester Vincent*, whereupon the last mentioned *Elizabeth* and *Hannab Vincent*, spinster, presented the said *Thomas Gresley* their clerk, who upon the same presentation was admitted, instituted and inducted into the said north mediety; and the said plaintiff further says, that the said *Thomas Gresley* and *Elizabeth* his wife being so seised of one moiety, the remainder belonging as aforesaid; and the said *Hannab Vincent*, spinster, being so seised of the other moiety, afterwards on the 9th day of *November* 1759, at *Great Sheepy*, by indenture between *Thomas Gresley*, and *Elizabeth* his wife of the first part, the said Sir *Nigell* and *Francis* of the 2d part, the said *Hannab Vincent*, spinster, of the third part, the said *Hannab Vincent*, widow, of the 4th part, and the said *Edward* (the plaintiff) of the 5th part, (which indenture the plaintiff brings into court) the said *Thomas* and *Elizabeth*, Sir *Nigell* and *Francis* did grant the said moiety whereof the said *Thomas* and *Elizabeth* were so seised as aforesaid,

852. 25. 11. 1763. 1764.

in

*Just sum, to be
admitted in 1759
and 1760*

Grant to the
plaintiff in fee
of the advow-
son.

Statute 21 H.
8. against
pluralities.

*q. wh^r it need have been
pleaded*

*certainly not necessary
bec: the vol. & inst. of
Bishop was after the
stat. of 21. H. 8. in
26. H. 8. - vide Cro. Car.
456.*

*q. wh^r any necessity of
this averment.*

aforesaid, and the said remainder thereof so limited to the said Sir *Nigell* and *Francis* and the said *Thomas*, to the said *Edward* (the plaintiff;) to have and to hold the said last mentioned moiety to the said *Edward* and his heirs; and the said *Hannab Vincent*, spinster, by the same indenture did grant to the said *Edward* the said other moiety of the said advowson; to have and to hold the same to said *Edward* and his heirs; by virtue of which said indenture he became and is now seised of the said advowson in gross, as of fee and right. And the said *Edward* further says, that by a statute made in the 21st year of *Henry* the 8th, it was enacted (among other things) that if any person or persons having one benefice with the cure of souls of the yearly value of 8 l. or above should take any other with cure of souls, and be instituted and inducted in possession of the same, that then immediately after such possession had thereof the first benefice should be adjudged to be void; and that it should be lawful to every patron having the advowson thereof, to present another, and the presentee to have the benefit of the same in such manner as though the incumbent had died or resigned; any licence, union or other dispensation to the contrary thereof obtained notwithstanding; as by the said act (among other things) more fully appears; and the said *Edward* says, that the said benefice at the time of making the said act, and at the time the said *Thomas Gresley* was admitted, instituted and inducted thereto, was and still is a benefice with cure of souls of the yearly value of 8 l. and the said *Thomas Gresley* being so admitted, instituted and inducted into the said north mediety of the said church, and the said *Edward* being so seised of the said advowson, afterwards on the 22d day of *December* 1759. the said *Thomas Gresley* accepted and took another benefice, with cure of souls of the yearly value of 8 l. to wit, the rectory of the parish church of *Seale* in the said county of *Leiceffer*, and afterwards, to wit, on the 22d day of *December* last mentioned the said *Thomas Gresley* was admitted, instituted and inducted into the said church of *Seale*, whereby and by force of the said statute the north mediety of the said church of *Great Sheepy* became void, and the said *Edward* was seised of the advowson of the said north mediety of the said church of *Great Sheepy* as aforesaid, at the time the same so became void, and still is so seised thereof; and by reason of the premisses, and by force of the said statute, it now belongs to the said *Edward* to present a fit person to the said north mediety of the said church of *Great Sheepy*, and the said *Bishop* and *Thomas Whitehead* unjustly disturb the said *Edward* therein, to the damage of the said *Edward* of 300 l. and therefore he brings this suit, &c.

Plea, that the
bishop claims
nothing but as
ordinary.

The bishop by his plea says, that the north mediety of the church of *Great Sheepy* is in the diocese of *Lincoln*, and that he claims nothing therein or in the advowson thereof, except the admission, institution and induction of parsons thereinto, and the amoval of them therefrom

therefrom, and all such other things belonging to, and as ordinary of that place; and the *Bishop* further says, that the plaintiff ought not to have his action against him, because he says that the said *Elizabeth Vincent*, widow, was seised, &c (and admits the title as set forth in the declaration, down till the presentation of the said *Thomas Gresley*) and (then he says,) that by the said act of parliament it is enacted, (as in the said declaration mentioned) and that the said benefice of *Great Sheepy* at the time of the making of the said act, and at the time of the admission, institution and induction of the said *Thomas Gresley*, and from thence was and still is a benefice with cure of souls of the yearly value of 8*l.* as the plaintiff has above alledged; * but the said *Bishop* further says, that the said *Thomas Gresley* being so admitted, instituted and inducted into the said north mediety of the church of *Great Sheepy*, and being incumbent thereof, he the said *Thomas Gresley*, on the 31st day of *October* 1759. accepted and took the said rectory of the parish church of *Seale*, and was then and there admitted and instituted into the same rectory, as by the plaintiff is alledged, which said rectory of *Seale* then was, and is, a benefice with cure of souls of the yearly value of 8*l.* whereby and by force of the statute aforesaid the north mediety of the church of *Great Sheepy* became vacant; and the *Bishop* further says, that the said north mediety of the church of *Great Sheepy* was, remained and continued so vacant from the time that the said *Thomas Gresley* accepted and took the said rectory of the church of *Seale*, and was admitted and instituted into the same as aforesaid, for the space of six whole months then next following, whereby the right of collating to the said north mediety of the church of *Great Sheepy* devolved to the said *Bishop* as ordinary of that place, by reason of the lapse of time aforesaid; wherefore the said bishop, after the said six months from the time that the said *Thomas Gresley* accepted and took the said rectory of *Seale*, and was admitted and instituted into the same, were lapsed, collated the said north mediety of the church of *Great Sheepy* on the said *Thomas Whitehead* his clerk, and caused the said *Thomas Whitehead* to be instituted and inducted into the same, by reasonw hereof the said *Thomas Whitehead* from thence hitherto hath been, and still is, parson of the said north mediety of the church of *Great Sheepy* imparsoned in the same; and this the said *Bishop* is ready to verify; wherefore he prays judgment if the said plaintiff, without assigning some special impediment in the power of him the said *Bishop*, ought to have his said action against him.

D. Poole.

And the said *Thomas* makes defence and says, that he is parson imparsoned of the said mediety, of the collation of the said *Bishop*; and further says, that the same became vacant by the said *Thomas Gresley's* accepting and taking the rectory of *Seale* aforesaid, on the 31st day of *October* 1759. and so remained vacant until on the 20th

* See the note at the end of the case.

Bishop pleads the church was void on institution to the second living, and continued void six months, and after that time he collated by lapse

Incumbent's plea that the bishop collated the church on him by lapse.

PART. II.

Z z

day

day of *June* 1760, on which day at *Great Sheepy* the said *Bishop* as ordinary by lapse of six months collated the said *Thomas Whitehead* to the said mediety of *Great Sheepy* then vacant; and this he is ready to verify; wherefore he prays judgment if the plaintiff ought to have his said action against him.

G. Nares.

Replication to the Bishop's plea.

That the late incumbent was not inducted to 2d living till 22 December 1759. and that within six months after he presented his clerk to the Bishop, who refused to institute him.

Replication to the incumbent's plea.

The Bishop's rejoinder.

The plaintiff replies to the bishop's plea, that he ought not to be barred thereby from his action against the *Bishop*, because protesting that he the plaintiff had not any notice that *Gresley* had accepted the church of *Seale*, and was admitted and instituted thereto before the said 22d day of *December* 1759. for replication says that *Gresley* was inducted in possession of the said rectory of *Seale* on the said 22d of *December* 1759. and not before, and that within six months after the said 22d of *December* 1759. viz. the 29th of *March* 1760. by writing under his hand and seal dated the same day last mentioned, he did present to the said *Bishop* one *Thomas Hall*, his the said plaintiff's clerk, and requested the *Bishop* to admit and institute the said *Hall* to the said north mediety of *Great Sheepy* so vacant as aforesaid, whom the *Bishop* refused to admit and institute thereto on the said presentation of the plaintiff, and hindered him in the said presentation thereto; but the *Bishop* afterwards on the 20th of *June* 1760. collated to the said north mediety (being vacant) on the said *Thomas Whitehead*, as the said *Bishop* hath in his plea above alledged; and this the plaintiff is ready to verify, and prays judgment and his damages by occasion of the said hindrance, and also a writ to the said bishop to be adjudged to him the said plaintiff. The replication to the incumbent *Whitehead*'s plea is exactly the same as the replication to the bishop's plea (only changing the bishop's name for the incumbent's name.)

The *Bishop* rejoins, and admits that *Gresley* was inducted into the church of *Seale* the 22d of *December* 1759. and that the plaintiff within six months from that day presented *Hall* his clerk, as the plaintiff has alledged in his replication; but the *Bishop* further says, that before the said 22d of *December* 1759. *Gresley* accepted the church of *Seale*, viz. on the 31st of *October* 1759. and on that same day was admitted and instituted to the said church of *Seale*, whereby and by the said statute the said north mediety of *Sheepy* became void; and the *Bishop* further says, that the said *Hall* did not within six months from the time that *Gresley* was admitted and instituted to the church of *Seale*, or at any time before the collation of the north mediety of *Great Sheepy* on *Whitehead*, and his being instituted and inducted into the same, present, or offer himself, or appear before the said *Bishop* to be examined in order to his being admitted to the north mediety of *Great Sheepy*, but neglected so to do, wherefore the *Bishop*, after the said six months from the time *Gresley* was admitted and instituted to the church of *Seale*

Seale, were elapsed, collated *Great Sheepy* on *Whitehead*, and caused him to be instituted and inducted into the same, as the Bishop has above alledged; *without this*, that the Bishop before he collated the north mediety of *Great Sheepy* on *Whitehead* did refuse to admit and institute *Hall* to the said north mediety of the church of *Great Sheepy* upon the said presentation of the said plaintiff, as the said plaintiff hath above alledged; and this the *Bishop* is ready to verify; wherefore he prays judgment if the said plaintiff ought to have his said action against him, &c.

The incumbent rejoins and says it is true the said *Thomas Gresley* The incumbent's rejoinder. was inducted in possession of the said rectory of *Seale* on the 22d day of *December* 1759. and not before; but says that the mediety of the said church of *Sheepy* became vacant by the said *Gresley's* accepting the said church of *Seale* on the 31st day of *October* 1759. and so remained void until on the 20th day of *June* 1760. on which day the *Bishop* collated *Sheepy* on this incumbent by lapse; and the said incumbent further says, that on the 31st day of *October* 1759. the plaintiff had nothing in the advowson of the church of *Sheepy*; and this he is ready to verify; wherefore he prays judgment, and that the plaintiff may be barred from having his action against him, &c.

The plaintiff demurs to the *Bishop's* rejoinder, and shews for Demurrer: special causes; 1. That it is a *departure* from his plea. 2. That it traverses matter not alledged by the plaintiff. 3. That it does not traverse the *induction*. 4. Nor does the *Bishop* say whether he did or did not collate to *Sheepy* before the end of six months after the *induction* of *Thomas Gresley* to *Seale*. 5. That the rejoinder tends to put in issue matter of law to the country.

The plaintiff's demurrer to the incumbent's rejoinder is much the same as to the *Bishop's*.

The *Bishop* and the incumbent severally join in demurrer.

This case was argued three times at the bar, the 1st time in *Hilary* term 2 Geo. 3. the 2d time in *Trinity* term following; and the third argument for the plaintiff in *Easter* term 3 Geo. 3. and in *Trinity* term following for the defendant.

A note taken of the first argument for the plaintiff. It appears upon the pleadings that *Thomas Gresley* being incumbent of the church in question, on the 31st of *October* 1759. was instituted to a second benefice with the cure of souls, of the yearly value of *8l.* and that on the 22d of *December*, and not before, he was inducted into the same; that the *Bishop* (supposing the present living in

in question to be void upon *Gresley's* institution to the *second, before induction*) on the 20th of June 1760. collated the defendant *Whitehead* to the church of *Great Sheepy* by lapse without notice to the plaintiff.

2 Ro. Abr.
353. pl. 6.
Hob. 165.
266.
Vaugh. 131.

Therefore the question is, whether the church was void upon the *institution* to the second benefice, or not before *induction* to it, so as the bishop could collate without notice; for if it was not void before *induction*, then the *Bishop* has collated two days too soon; for by the *stat. 21 H. 8. c. 13. s. 9.* it is clear that the first benefice shall not be void before induction to the second.

Agar v. The Bishop of Peterborough and Denn, in quare impedit. For title to the avoidance, the *stat. 21 Hen. 8.* was pleaded the taking of a second benefice, with cure, the issue was taken upon the *induction* to the second benefice, whereby (says the book) it seems to be allowed, that *admission* and *institution*, do not make the first void, without *induction*. *Moor 12. pl. 45.*

Watson in fol.
page 12.
W. Jones 337.
Codex 945,
946.

A note of the first argument for the defendants. This question depends upon the *stat. 21 H. 8.* which says, that if *one* having a benefice with cure, of 8*l. per ann.* accepts another with cure, and be *instituted and inducted* in possession of the same, then and immediately after such possession had thereof, the first benefice shall be adjudged void. The word *possession* in this statute is very material, for a parson is in possession immediately upon *institution* and before *induction*; the point I put this case upon is, that to the second, induction is not necessary to take the first benefice void; but if it is, it is only that the patron may have notice, *Moor 443.* but as to every body but the patron, it is void by institution to the second benefice; and for this I rely upon *Digby's* case, 4*Rep.* 78. *b. 79. a.* and the patron may present without any sentence of deprivation.

Dyer 283. a.
pl. 28.

Owen 131.

The patron, upon the institution to the second benefice, might have presented, because I insist, the church, thereupon, was void, and being a *chose in action*, it could not pass by the grant of the advowson afterwards made to the plaintiff on the 9th of November 1759. which was nine days after the institution to the second benefice, as appears by the declaration. *Cro. Eliz.* 811. And suppose notice necessary to be given to the patron, yet it is not so to the grantee, because it is uncertain to whom it must be given.

Plaintiff's counsel: I agree that *induction* and notice are much the same thing; and if notice be necessary, induction must be so too, the incumbent cannot sue for tithes before *induction*.

Ld.

Ld. Chief Justice: He can do every thing else. I want to know how this matter was at common law, whether upon the incumbent's taking a second benefice the patron could, or could not present before sentence of deprivation, I have great difficulties, and shall be glad to hear another argument.

The second argument for the plaintiff, at first setting out, was much to the same effect as the first argument

The second argument for the defendants by serjeant *Wilson*.

It appears upon this record that on the 31st of *October* 1759. the late incumbent of this church in question, was instituted to a second benefice.

That on the 9th of *November* 1759. the patron of this church in question granted the advowson thereof to the plaintiff.

That on the 22d of *December* 1759. the late incumbent thereof was inducted to the second benefice; and

That on the 20th of *June* 1760. the bishop collated the defendant *Whitehead* to the church in question, without notice to the late patron, or to the plaintiff, his grantee of the advowson.

Two general questions are made; 1st, Whether the first living became so absolutely void upon institution to the second living, that the patron, or the plaintiff his grantee, were bound to take notice, without notice given to them?

2^d, Whether the first benefice was so void, upon institution to the second, that by the grant of the advowson in fee nine days afterwards this turn could be transferred to the plaintiff?

If it appears upon this record that the plaintiff hath no title, he cannot have judgment, be the title of the defendant ever so defective.

It is on the defendant's part to contend, that as soon as the late incumbent was instituted to the second, this first living was void, insomuch that the patron could not afterwards transfer the right of presentation for this turn, by his grant of the advowson in fee to the plaintiff; and that the Bishop had a right to collate, after six months elapsed from the time of the institution, without giving notice to any body.

How the law stood concerning pluralities before the statute of 21 Hen 8. c. 13. and whether that statute hath made any and what alteration in the present case, may be first considered.

One cannot well trace this matter further back than the third * Anno 1179. council of *Lateran*, * for, but a few years before that time, there was no such thing as a lay patronage in this kingdom. It appears from the most authentic ecclesiastical writers, that from the latter end of the sixth century until about the conquest, all oblations, † tithes, &c. of a whole diocese were the voluntary gifts of Christians, brought into one publick stock, and divided by order of the Bishop into several portions for the support of himself, his clergy, the poor, and the reparation of churches.

The parochial clergy in general, lived with the Bishop in the city, who sent them out occasionally to preach the gospel throughout his diocese, and every priest received the oblations, &c. within his own circuit, and brought them into the publick stock.

In this manner were the clergy *instituted* by the bishop, and in whatsoever part of the diocese a priest *was* (by his order,) he was (properly speaking) resident upon his cure; for residence *then* was relative to the whole diocese, as it is now to a single parish. *Sherlock the Bishop of London's Charge to his clergy, anno 1759.* touching pluralities and non-residence, page 25.

Although some writers ascribe the division of *parishes* to Archbishop *Honorius* about the year 636, from the authority of Archbishop *Parker*, who says, That *Honorius provinciam suam in parochias divisit*; yet Mr. *Selden* says, "The passage means that he divided his *province* into *dioceses*"; and Bishop *Sherlock* seems to agree with him, in his *charge to his London clergy 1759. fo 25.* where he says that the word *parish* in the old canons. used to signify a *diocese*, as appears by injunctions given to Bishops not to invade the *parishes* of each other.

Leges Alfred.
No. 24.

The clergy were then no other than collectors and stewards of the tythes and oblations till about the 10th or 11th century, and their residence was in any part of the diocese as the Bishop ordered. *Kennett's Paroch. Antiq.* 78, 79. * they were instituted, but could not properly have any *inductum* or *seign* of any church in the diocese.

* Glanvil 29.
See a declaration in reClo
advocation."

† The first council that mentions *tithes* is that of *Lateran, anno Domini 1119.* under Pope *Calixtus 2.* and there they are only spoken of, as received by special consecrations. There was no canon before that of the fourth council of *Lateran anno Dom. 1215.* held under Pope *Innocent 3.* that even supposed tithes due of common right.

This being inconvenient, as christianity spread, great encouragement was given to lords of manors, and other great men, to build churches for themselves and tenants on their own lands; and for this purpose, the Bishop yielded part of his right to such founders, permitting them to name a person to serve the living, provided he was well qualified; the judgment of which, the Bishop reserved to himself. And his judgment, whether fit or not, is conclusive to this day. *Sber. Charge in 1759. 26.* And this is the origin of lay patronages, and the first beginning of the division of *parishes* into the limits we now find them; which (it seems) began about the time of the conquest, or a little after, and was a work of some ages.

Before this period there seems to have been no law against *pluralities* and *non-residence*, so that every priest who loved the *Fleece* more than the *Flock*, got possession of as many churches as he could; and if he had forty, there was no law to the contrary; this accounts for what is often mentioned in our books, "That, at common law a man might have held forty livings if he could have got them."

This avaritious behaviour of the clergy, occasioned the making of several canons and constitutions against pluralities and non-residence. It is proper only to take notice of such of them as have been received here, and are now part of the law of the land, and which most materially concern the present question.

By the 3d council of *Lateran*, * held under Pope *Alexander 3.* *Anno Domini. 1179. 5 Hen. 2.* Whoever took a second benefice, his institution to it was void; and every person admitted a *decehsum vel ecclesiasticum ministerium* is bound *residere in loco, et curam per seipsum exercere.*

* The Bishops of Durham, Norwich, Hereford and Bath, were sent to this council. Seld. 3d Vol. 1793.

N. on Drayton's Polyolbyon

These are the words of the 4^d canon

"Quia nonnulli, modum avaritiæ non ponentes, dignitates diversas ecclesiasticas, et plures ecclesias parochiales contra sacrorum canonum instituta nituntur ACCIPERE, ut cum unum officium vix implere sufficient, sibi vendicent stipendia plurimorum: ne id de ceterò fiat, districtius inhibemus. Cum igitur ecclesia, vel ecclesiasticum ministerium committi debuerit, talis ad hoc persona queratur quo residere in loco, et curam ejus per seipsum valeat exercere; quod si aliter actum fuerit et qui receperit quod contra sacros canones accepit, amittat, et qui dederit, largiendi potestatem privetur. *Extra. lib. 3. tit 4. de clericis non residentibus. Can. 43.*"

The 3d Lateran council made the 2d living void.

By

4 Lateran
council made
the 1st void.
Present
4 Patriarchs
71 Archb.
340 Bishops,
800 Abbots &
Priors

1215 Total.

By the 4th (which is called the great) council of *Lateran*, if any person having one benefice with cure of souls, accepts a second, the first is declared void *ipso jure*; this was held under Pope *Innocent 3.* Anno 1215. 6 Ric. 1.

These are the words of the 28th canon of this council: "Qui-
cunq' receperit aliquod beneficium curam habens animarum an-
nexam, si prius tale beneficium habebat, eo sit ipso jure privatus,
et si forte illud retinere contenderit, etiam alio spoliatur. Is
quoque ad quem prioris spectat donatio, illud post receptionem
alterius liberè conferat cui meritò viderit conferendum: et si ultra
sex menses conferre distulerit, non solum ad alius secundum La-
terensis concilii statutum ejus collatio devolvatur, verumetiam tan-
tum de suis cogatur proventibus in utilitatem ecclesiæ cujus est
illud beneficium assignare, quantum a tempore vacationis ipsius
constiterit esse perceptum. Hoc idem in personalibus esse de-
cernimus observandum, addentes ut in eadem ecclesia, nullus,
plures dignitates aut per sonatus habere presumat, etiam si curam
animarum non habeant. Circà sublimes tamen et literatas perso-
nas, quæ majoribus beneficiis sunt honorandæ, cum ratio postula-
verit, per sedem apostolicam poterit dispensari. *Extra lib. 3.*
tit. 5. de Prebendis, Can. 28.

So that by this canon whoever took a 2d benefice was deprived *ipso jure* of the 1st, and the patron might present to it immediately, and if he did not within six months, the Bishop might collate, and order the profits received since the avoidance to be assigned to the collatee.

2d council of
Lyons makes
one or both
livings void.

By the 2d council of *Lyons* held under Pope *Gregory 10th* Anno 1274. 3 Ed. 1. upon taking a 2d living, the first was void, and if he was not contented with the 2d but endeavoured to keep both above a month, he was deprived of both.

This canon
was received
here.
Latch 243.
England sent
Bishops to it.
Moor 119.

(21)

The constitution of *John Peccham* upon the canon made at this council of *Lyons* runs thus: "Qui plura beneficia curam animarum
habentia, sine dispensatione, ultimo contentus sit; & decernimus,
& perpetua stabilitate firmamus, ut quicumq; in posterum plura
beneficia curam animarum habentia, seu alias incomparabilia,
absque sedis apostolicæ dispensatione, RECEPERIT, vel affecutus
fuerit per modum INSTITUTIONIS, vel commendæ, seu custodiæ,
vel unum, titulo institutionis, aliud, titulo commendæ vel custo-
diæ, præter modum illum quem constitutio Gregoriana edita in
concilio Lugdunensi permittit, EO IPSO sit privatus omnibus sic
obtentis beneficiis, ipsoq; facto sententia excommunicationis per-
maneant innodatus: a qua, non, nisi per nos, aut successores no-
stros, vel sedem apostolicam absolutionis gratiam valeat promereri.
Lind. lib. 3. tit. 6. fo. 136, 137. de præbendis."

Observe the words, "Qui verò affectus fuerit per modum INSTITUTIONIS," was to lose both livings; but notwithstanding these well intended canons, the Pope's dispensing power (reserved to him thereby) rendered them of little effect.

To redress the grievance of holding pluralities by dispensations there is to be found among the *Extravagantes* printed at Paris 1505. 4to. a decretal of Pope John the 22d, beginning *Execrabilis quorundam tam religiosorum quam secularium ambitio*; which (after reciting the many evils of pluralities and non-residence) decrees that whoever holds a plurality by dispensation, shall make his election within a month after notice of the decree, which benefice he chuses to keep, and shall resign the others; and if he does not, all his livings shall be void. *Extra lib. 3. tit. de Prebendis & Dignitatibus, fo. 19, &c.* dated at Avignon 13 Kal. Decemb. in the 2d year of his pontificate. This was in the year 1277. 6 Ed. 1. three years after the council of Lyons.

One instance of a title made under this decretal. 10 E. 3. 1. Watson 21.

From hence it appears,

(1.) That by a canon in the 3d council of Lateran, the second living was void by deprivation. 1179. 5 H. 2.

(2.) By a canon in the 4th council of Lateran, the first living was ipso jure void, by accepting a second, without deprivation. 1215. 6 R. 1.

(3.) By a canon in the second council of Lyons, the first was void, and if he endeavoured to keep both, he was to lose both. 1274. 3 E. 1.

(4.) By the decree of Pope John 22. no one could hold two dignities or benefices by dispensation, except he was a cardinal, or the relation of some prince. 1277. 6 E. 1.

These canons have all been received here, as appears from a multitude of cases in our law-books: but the * canon of the 4th Lateran council for making the 1st benefice void, has been the law most generally used and approved here, and was certainly the law of the land long before the statute of 21 H. 8. So that before the statute (it seems pretty clear) the church in question would have been void by the canon law upon the incumbent's acceptance of institution to the 2d benefice, without any sentence of deprivation; for the words "ipso jure fit privatus in the 4th council of Lateran, " was a general sentence of deprivation." Sir W. Jones 377.

* Is as strong as an act of parliament. Hard. 101. Lynd. 5 Ed. 3. 9. 25 E. 3. 49. 4 Rep. 75. 79. 11 H. 4. 60. Canons not contrary to law, here received.

Continued per 25 H. 8. c. 19. f. 7. No canons since bind laics. 5 Rep. 9, 32. Watson 23.

Not a word of
induction in
any of these
canons.
3. Lateran.
4. Lateran.
2. Lyons.

It is observable that there is not a word said of *induction* in any of these canons, but the words are "qui nituntur accipere plures ecclesias, &c. Quicumq; receperit aliquod beneficium, &c. Quicumq; plura beneficia receperit, vel affectus fuit per modum INSTITUTIONIS, &c." And the words *accept and take* in the statute of 21 H. 8. seem to be copied from them.

If it may be allowed to cite Doctor *Ayliffe's Parergon Juris Canonici Anglicani*; He lays it down in fol. [416.] That all benefices with cure of souls are by the constitution of the fourth council of *Lateran* void *ipso jure* (without a dispensation) by an admission to a second benefice *though they are not inducted to either, but have only institution thereunto.*

Such part of the canon law as hath been received here is not the Pope's law, but the law of the land, which no ecclesiastical power could ever lawfully dispense with. *Vau. 21.* So there is no occasion for a sentence of deprivation, by our law.

And although this part of the argument is drawn from the canon law, and the law of the popes, yet it must be owned those laws were never acknowledged to be laws of *England*; and therefore they are no further of authority than as they agree with the law, or common law of *England*, and so have been received here.

The common law ever set its face against *pluralities, non-residence*, and the *Pope's usurp'd dispensing power*; and Lord *Vaughan* scouts the distinction made between a cession by an incumbent's accepting a bishopric, and an incumbent's taking a second benefice. It passes for current (says he) in our new books, that in the case of pluralities the avoidance is by the canon law, and therefore may be dispensed with, by that law; but that in case of a Bishop made, the avoidance is by the common law. He seems to smile at the distinction, and says, the patron may present as soon as the incumbent is instituted to the second living, *without deprivation*; and the law was antiently so. *Vau. 21.*

The great
council 1215.

Mr. *Selden* in his notes upon *Drayton's Polyolbion*, 3d Vol. 1793. published by Dr. *Wilkins*, says, that *England* used to send four Bishops to general councils. By this course, canons, have been received into our law. As of *bigamy* in the council of *Lyons*, interpreted by parliament under *Ed. 1.* of *pluralities* in the council of *Lateran* under pope *Innocent 3.* The law of *Lapse* had its ground in the council of *Lateran*, anno 1179. under pope *Alexander 3.* where laymen were only allowed four months, though the clergy or religious, who had title, had six months; but this was never allowed or agreed to here; for every patron has six months in *England*.

From

From hence (says *Selden*) " You cannot but perceive that canons
 " and constitutions in the pope's councils never bound us in other
 " form than fitting them by the square of *English* law, and policy.
 Our reverend sages and baronage allowed and interpreted them; and
 in framing their writs would mention them † *as law and custom* of
 the kingdom, and not otherwise.

† Reg. 42. in
 a writ of pro-
 hibition lapse
 common law.

is mentioned to be by the

With respect to the ceremony of *induction*, it is observable,
 that in our most ancient precedents of declarations and pleadings in
 writs of right of advowson touching the inheritance, or in *quare im-*
pedi, and *darrein presentment*, touching the possession or turn, there
 is no mention made of *induction*; but in order to shew seisin or
 possession in the demandant or plaintiff, or of him under whom
 he claims, he only alledges that he *presented* his clerk, who was
instituted.

Tho' it is said
 that induction
 of his clerk
 must be al-
 ledged who
 brings writ of
 right of ad-
 vowson.
 Ro. Ab. 383.
 Yet there is a
 Quere put
 38 H. 6. 17.

To prove this, *Glanvil*, lib. 4. de *Advocationibus Ecclesiarum*,
cap. 6. temp. H. 2. Bishop Nicholson's Hist. Library 223. " Is qui
 " petit jus suum in haec verba versus adversarium suum proponet.

" Peto advocacionem illius ecclesiae sicut jus meum, et pertinentem
 " ad hereditatem meam, et de qua advocacione ego fui seifitus, (vel
 " aliquis antecessorum fuit) tempore regis Henrici avi domini regis
 " (vel post coronationem domini regis :) et adeo seifitus ad eandem
 " ecclesiam vacantem praesentavi, personam (aliquo praedictorum
 " temporum :) et ita presentavi, quod ad presentationem meam
 " persona fuit in ea ecclesia INSTITUTA et si quis hoc voluerit
 " negare, habeo probos homines qui hoc viderunt et audierunt
 " et parati sunt hoc diracionare secundum considerationem curiae,
 " et maxime illum B. et illum, & illum.

" Audito autem clameo ipsius petentis, is qui tenet poterit se de-
 " fendere per duellum vel ponere seipsum in assisam magnam.

The following is a record in *quare impedit*, copied truly from a
 M. S. in parchment in the possession of the reporter, which is pre-
 sumed to be part of the original year book of 18 *Edward 2.* it being
 written in the court hand of that time; it being curious for its an-
 tiquity is inserted here at length.

To shew that
 induction was
 not used in
 pleadings.

De

De termino Trinitatis anno Regni Regis Edwardi decimo octavo.

- * Lythom or Lethom in Lancashire, a priory of Benedictine monks. Dr. Tanner's Not. Monastica 233.
- † There is not a word of induction in the whole record.
- A recovery by a former prior in quare impedit in C. B. against a stranger.
- Hob. 154.
- The record of that recovery removed into B. R. and a scire facias to shew cause why the prior should not present on another avoidance. Judgment for him in B. R. on the scire facias, and a writ to the Bishop.
- “ Edmundus de Appelby summonitus fuit ad respondendum priori
 “ de * Lithom de placito quod permittat ipsum presentare ydoneam
 “ personam ad ecclesiam de Appelby, quæ vacat & ad suam spec-
 “ tat donationem, &c. et unde idem prior per I. de A. attornatum
 “ suum dicit quod quædam Margeria Banaster quondam fuit seifita
 “ de manerio de Appelby, ad quod prædicta advocatio tunc pertine-
 “ bat, quæ ad eandem ecclesiam presentavit quendam Ricardum
 “ Midde clericum suum, qui ad presentationem suam fuit admissus
 “ & † institutus tempore pacis tempore Henrici regis avi domini
 “ regis nunc; et postea eadem Margeria per cartam suam dedit &
 “ concessit advocationem prædictam cuidam Willielmo priori de Li-
 “ thom, tenendum eidem priori & successoribus suis et ecclesiæ
 “ suæ sancti Cuthberti, in puram et perpetuam elemosinam in per-
 “ petuum; et dicit quod vacante ecclesiâ prædictâ per mortem dicti
 “ Ricardi, quidam Willielmus, filius Willielmi Vernon opposuit
 “ se presentationi prædicti prioris; per quod idem prior tulit breve
 “ quare impedit versus ipsum Willielmum, de advocatione prædicti
 “ coram iusticiariis prædicti Henrici regis avi, &c. hic de Banco,
 “ anno regni sui quinquagesimo, et presentationem suam, per ju-
 “ dicium ejusdem curiæ versus eum recuperavit; itâ quod episcopus
 “ Lincoln' tunc, per lapsum temporis eadem ecclesiam contulit
 “ cuidam Thomæ Mandeville clerico suo, et eum instituit in eadem
 “ ut in jure ipsius prioris & ecclesiæ suæ prædictæ, &c; et postmo-
 “ dum vacante prædictâ ecclesiâ per mortem prædicti Thomæ, qui-
 “ dam Ricardus Vernon consanguineus & hares prædicti Willielmi
 “ filii Willielmi opposuit se presentationi cujusdam Ambrosii tunc pri-
 “ oris de Lithom, predecessoris ipsius prioris nunc, per quod idem
 “ Ambrosius venire fecit coram Radulpho de Hengham et sociis suis
 “ iusticiariis ad placita regis recordum prædicti placiti habiti hic
 “ inter prædictum Willielmum quondam priorem, &c. et prædictum
 “ Willielmum filium Willielmi antecessoris prædicti Ricardi; ita
 “ quod iidem iusticiarii præmuniri fecerint prædictum Ricardum
 “ per breve de *scire facias* effendi coram domino Edwardo rege
 “ patre domini regis nunc anno regni sui decimo sexto, ostensum
 “ si quid pro se haberet vel dicere sciret quare prædictus prior præsen-
 “ tationem suam habere non debet; ita quod in octabis sancti Jo-
 “ hannis Baptiste anno regni regis Edwardi supradicto considera-
 “ tum fuit quod prædictus prior haberet breve episcopo quod (non
 “ obstante reclameo prædicti Ricardi). ad præsentationem ipsius
 “ prioris ad prædictam ecclesiam ydoneam personam admitteret, et
 “ dicit quod episcopus illa vicê eadem ecclesiam per lapsum tem-
 “ poris contulit cuidam Johanni de Arraiins decano clerico suo et eum

" * *instituit* in eadem ut in jure ipsius prioris et ecclesiæ suæ prædictæ, per cujus mortem prædicta ecclesiæ modò vacat, et, è ratione, nunc ad ipsum priorem ad prædictam ecclesiæ pertinet presentare, prædictus Edmundus eum injustè impedit, unde dicit quod deterioratus est et damnum habet ad ducentas libras, et inde pro- ducit sectam.

• Not a word of induction.

" Et prædictus Edmundus venit & defendit vim, &c. et dicit Plea. quod ad ipsum Edmundum, et non ad prædictum priorem, ad prædictam ecclesiæ pertinet præsentare, quia dicit quod cum prædictus prior sumat titulum suum præsentandi ad prædictam ecclesiæ de dono prædictæ Margeriæ, quam idem prior asserit præsentasse ad prædictam ecclesiæ prædictum Ricardum Midde clericum suum qui ad præsentationem fuit admissus & *institutus* tempore pacis regis Henrici, quidam Henricus Appelby avus ipsius Edmundi cujus hæres ipse est ultimò præsentavit ad eandem ecclesiæ quendam magistrum Henricum Lovel clericum suum, qui ad præsentationem suam fuit admissus & *institutus* tempore pacis tempore prædicti regis Henrici, per cujus mortem, ut per mortem ipsius qui ultimò fuit præsentatus per verum patronum, prædicta ecclesiæ modò vacat, et hoc pretendit verificare, &c. unde petit judicium.

That the grandfather of defendant presented a parson the last.

" Et prior dicit quod cum ipse narrando versus ipsum Edmundum sumat titulum suum de dono prædictæ Margeriæ de avocatione prædicta, post quod donum, vacante ecclesiâ per mortem prædicti Ricardi Midde, prædictus Willielmus filius Willielmi opposuit se presentationi prædicti Willielmi quondam prioris, &c. quam ipse tunc fecit ad eandem ecclesiæ, et versus quem idem prior recuperavit presentationem suam per judicium curiæ domini regis, et habuit breve prædicto episcopo ut prædictum est; ita quod collatio ejusdem ecclesiæ, quæ prædictus episcopus fecit prædicto Thomæ de Mandeville, fuit, & computari debet in jure ipsius prioris et ecclesiæ suæ prædictæ; et postmodum vacante prædictâ ecclesiâ per mortem ipsius Thomæ de Mandeville, prædictus Ricardus de Vernon opposuit se presentationi prædicti Ambrosii quondam prioris, &c. versus quem idem prior iteratò, præconsiderationem curiæ domini regis habuit breve episcopo ut præmittitur; ita quod collatio quam episcopus tunc fecit prædicto Johanni de Arraiins similiter fuit in jure ipsius prioris; qui quidem Johannes de Arraiins ultimò obiit persona in eadem ecclesiæ, prout ipse est paratus verificare; ad quas collationes in prædictis duabus ultimis vacationibus ejusdem ecclesiæ factas, prædictus Edmundus non respondit vel ostendit quod ipse vel aliquis antecessorum suorum in eisdem duabus ultimis vacationibus ejusdem ecclesiæ aliquem clericum suum ad eandem præsentaverint, vel aliquod clameum tunc opposuerint, per quod breve hoc haberi debet pro concessio, unde petit judicium, &c.

Replication maintains the declaration.

PART II.

C c c

" Et

- Rejoinder “ Et Edmundus dicit ut prius, quod prædictus Henricus avus
 “ suus tanquam verus patronus ecclesiæ prædictæ ultimò præsentavit
 “ ad prædictam ecclesiam prædictum magistrum Henricum Lovel
 “ clericum suum qui ad præsentationem suam fuit admissus et in-
 “ stitutus, absque hoc quod unquam aliquis clericus existerit admissus
 Traverfes that “ & institutus in prædictâ ecclesiâ ad præsentationem prædicti prioris
 any clerk was “ vel alicujus predecessorum suorum post præsentationem factam de
 ever instituted “ ipso magistro Henrico Lovel, et hoc pretendit verificare, &c. ad
 on the presen- “ quam verificationem non respondit, unde petit judicium, quod
 tation of the “ curia, hoc habeat pro concessio, &c. dicit prætereà quod non ha-
 prior or his “ bet necesse respondere ad collationes quas prædictus prior dicit præ-
 predecessors, “ dictum episcopum fecisse ad prædictam ecclesiam, nec etiam ad
 and demurs to “ placita seu ad judicia quæ prædictus prior allegat fuisse inter pre-
 the pleadings “ decessores suos et prædictos Willielmum filium Willielmi, & Ri-
 had between “ cardum de Vernon qui ipsi Edmundo sunt extranei, unde petit
 the former “ judicium et breve episcopo, &c. Dies datus est eis hic a die sancti
 prior and the “ Michaelis in quindecim dies; ad quem diem prædictus Edmundus
 Vernons be- “ venit et dicit quod non potest dedicere quin prædictus episcopus
 ing strangers. “ præsentavit jure ipsius prioris ad prædictam ecclesiam in omnibus
 Defendant “ ut prænotatum est. Idèò consideratum est per curiam quod præ-
 cognovit, &c. “ dictus prior habeat breve episcopo ut prædicta est, &c.
- Judgment and “
 writ to the
 Bishop for the
 plaintiff.

This record shews, that *induction*, in ancient times, was not used or thought of; that it is an authentic record, appears by *Fitzberbert's Grand abridgment*, title *Darrein Presentment*; where it is pleaded in another cause between the same parties in a *Darrein Presentment* brought by *Appelby* the defendant against the *Prior*, for the same church, debated the same term, which was compromised upon the *Prior's* paying *Appelby* a sum of money, whereupon the prior had a writ to the bishop.

Whether induction augments the title to a benefice? *Lynd. lib. 3. tit. 6. cap. 2. fol. 139. note (c)* upon the words “ *Institutus fuerit*. Cum enim institutus fuerit, Tunc enim habet jus, non “ solum ad rem, sed in re, Et hac enim institutione, acquiritur “ titulus, etiamsi possessio nondum sit adeptus: Nam in beneficialibus, “ beneficiorum traditio, non auget effectum tituli precedentis; et sine “ traditione transfertur Dominium.”

So that induction (is only a ceremony and) does not increase the title to a benefice. S. P. *Lynd. 141. note (u)* Induction is not part of the title where there is *institution*, but only where *induction* or *installation* habetur pro ipso titulo.

Having endeavoured to shew, that, by institution to a second, the first living was void by the canon law (which became part of our law) *ipso jure* without deprivation; and that anciently the ceremony of

of induction was not used; it shall next be shewn, that by the common law a church is compleatly full upon *institution* thereto, against *all* persons but the King; consequently any person having received *institution* to a second benefice, *has accepted and taken it*, and in such case the first would have been void, before the 21 H. 8.

At common law, before the *stat. Westm. 2.* (which does not mention the word *induction*) if one had presented to a church whereunto he had no right, and the Bishop had admitted and *instituted* his clerk, the incumbent could not be removed except by the King. 2 *Inf.* 357. *Co. Lit.* 344. b. 6 *Rep.* 49. *Boswell's case*; for these good reasons,

Anno 1285.
13 Ed. 1. ten
years after the
council of
Lyons.

1st. Because he was *in* by a judicial act of the Bishop.

2d. The law had its end when the church was filled with a fit person.

3d. That the incumbent having the care of souls might attend his charge in peace; so that after *institution* (says *Coke*) he should not be subject to any action to be removed at the suit of any common person on any account whatever; and if he could not be removed after *institution*, surely he had thereby *accepted and taken* the living.

Where a common person presents his *clerk*, and he is admitted and *instituted*, he cannot revoke his presentation though before *induction*. *Bro. Quare Impedit*, pl. 65.

If a gift be made to a parson before *induction*, it is good; so if he alien with consent, &c. before *induction*, it is good. *Goldsb.* 163.

No lapse can incur after *institution*, though no induction be ever made, because the church is full by *institution*. *Goldsb.* 164. And Lord *Hob.* 154. in the case of *Colt and Glover* versus *Bishop of Coventry*, says, I hold it clear that if the patron present, and his clerk be *instituted*, and remain without *induction* eighteen months, the King shall not present upon him by lapse, for the King cannot have a lapse but where the ordinary might have had it before; this proves most clearly that the church is full by *institution*; and even against the King, where the King has no right to the church as patron.

Hitchin v.
Glover S. P.
13 Jac.

The *stat.* of 21 H. 8. c. 13. s. 9, 10. comes next to be considered; whether it has made any, and what alteration of the law in this case, as it stood before?

Sect.

Seet. 9. enacts, "That if any person or persons, having one benefice with cure of souls, being of the yearly value of 8 l. or above, accept and take another with cure of souls, and be instituted and *inducted in possession of the same; then, and immediately after such possession had thereof*, the first benefice shall be adjudged in law to be void,

Seet. 10. "And it shall be lawful to every patron having the advowson thereof to present another, and the presentee to have the benefit of the same, in such like manner and form as though the incumbent had died or resigned; any licence, union, or other dispensation to the contrary hereof obtained notwithstanding.

The true key for construing a statute, is to consider the subject matter of it, and the ends and purposes for which it was made. *

* Perhaps this may be better done from the history and circumstances of the times than *ex visceribus* of the statute.

The preamble of the statute itself tells us it was "For the more quiet and virtuous increase and maintenance of divine service, the preaching and teaching the word of God, with godly and good example giving, the better discharge of curates, the maintenance of hospitality, the increase of devotion, and good opinion of the lay fee, toward the spiritual persons.

Colt and Glover v. Epif. Coventry fo. 157.

Lord *Hobart* says, "It was a most religious and politic church-law, and almost a redintegration of those holy antient canons, and a restoration of the church, ruined by the Popes *quot*, dispensations, &c.

This statute from the temper of the time when it was made, seems to have been intended to knock down the Pope's usurped power to dispense with pluralities, and was one great step towards it.

"It was the first statute or law which gave allowance to pluralities." *Latch* 244. Though it was made to prevent that multitude of them which existed through the Pope's usurped dispensing power, it doth not seem to have been made to introduce any new law *as to the point in question*, but was rather made in affirmance of the antient law of the church used in *England* long before this statute. *Davis* 69. *Case of Commenda*.

There are no negative words in it, that say the first benefice shall *not* be void until the incumbent be *inducted* into the second.

It is in the affirmative; whoever *accepts and takes* another with cure, &c. and the words that follow seem to be *ex abundanti*.

It

It was made to vindicate the King's prerogative, and to rescue this part of the law of the land from the Pope's intolerable usurped power, and was not calculated to alter the law as it stood in this point.

It was certainly the intent of the makers of this statute, that whoever *accepted and took* a second cure should void the first, unless he was properly qualified as this statute requires.

The words of statutes are not only to be considered, but rather the intent of the makers is to be weighed; for the intent is the principal thing to be considered, *per curiam*. *Plowd.* 464. a. b. 5 *Rep.* 5. S. P. *Plowd.* 231. S. P. The intent of a statute is to be principally considered.

And sometimes statutes are to be expounded against the letter, to preserve the intent. *Per Eyre C. J. Shower* 491. cites 3 *Rep.* 59. and *W. Jones* 105.

What Lord *Hob.* fo. 157. says, is very strong to this purpose, "It is (says he) the office of Judges to advance laws made for religion, according to their end; otherwise if a man take twenty benefices, and enter and take the profits of them all, but take no formal *induction*, he shall be out of the law. *Durus est hic sermo!*" 3 *Rep.* 7. b. S. F. *Hob.* 97. S. P.

And again; *Ld. Hob.* 346. says, "Judges have liberty and authority over statutes to mould them to the truest and best use, according to reason and best convenience."

And therefore notwithstanding by the letter of this statute the first living seems not to be void until *induction* into the second, "Yet to avoid the great inconvenience that otherwise would follow, it has been held that the first living is void upon the bare *institution* into the second; and so (it should seem) was the law before the making this act, where the party had no dispensation." *Degge* 24. *Dr. Godolph.* *Rep. Can.* 294. both allowed *per Lord C. J. North.*

But the words *inducted, &c.* have created the difficulty in this case; and it is objected on the other side, that this statute was not only made to destroy the Pope's usurped power, but also the sentence of *deprivation*, which (it is said) our spiritual courts had always held to be necessary in cases of pluralities; and therefore it has been argued, that *induction* was to be in the place and stead of a sentence of *deprivation*; and if so, the first (it is said) cannot be void before *induction* to the second living. Objection.

Answer.

In answer to this: it is very clear from the resolutions in *Holland's* case, and *Digby's* case, 4 Rep. 75. 79. b. that the first living in the present case was void upon institution to the 2d, before induction, without sentence of deprivation.

What Lord Popham says, was agreed to by the whole court, viz. "That although by the institution to the 2d benefice, the first is void by the ecclesiastical law without any deprivation, or sentence declaratory, yet no lapse shall incur against the patron unless notice be given him, no more than if the church became void by resignation or privation; and yet the patron may take notice if he will and, may present according to the constitution of Lateran, held under Pope Innocent 3." but the patron is not forced to take notice, at his peril, unless he is inducted; *quod fuit concessum per totam curiam.*

If this be law, the first living was absolutely void by institution to the second, before deprivation, and before induction; and the patron may take notice if he will, and may present. May present! to what? Not to a living that is full; that cannot be. And the common form of every presentation to the Bishop shews it. The patron (thereby) humbly prays the Bishop to admit (such a man) his clerk *ad ecclesiam jam vacantem*, &c. *W. Jones* 337. *Re: v. Priest.*

Objection.

It is further objected, "That if an incumbent takes a second benefice with cure, by which the first is void by the canon law against the patron, so that he may present before any deprivation; yet until deprivation, it is not void as to a stranger, for if he sue for tithes against a parishioner, it is no bar against him, that he had taken a second benefice". 2 Ro. Abr. 353. pl. 6. *Trin. 13 Car. B.R.* said by justice *Barkley*, that *Yelverton* in his argument of the case of *Priest* said that it was so adjudged.

Cro. Car. 357. is contra, by the greater number of the Judges in *The King and Priest.*

Answer.

1st, In answer to this, it is no more than a *dictum* of one judge of what another said *arguendo*.

2dly, It proves for the defendants that the first is void as to the patron, and that he may present before deprivation.

After institution he has a right to oblations.

Cases temp.

Annæ, 11 Mod. 46. *Viner*, Presentment 356. May enter into the glebe against any stranger, 2 Ro. Rep. 292 *Hitchin v. Glover*, before induction. And a person instituted shall have the profits against every common person. F. N. B. 80. margin, cites 31 Ed. 3. 4.

This seems to be laid down too largely, and to prove too much: For suppose an incumbent *instituted* to a second living, and the true patron of the first, the very next day, presents his clerk (which it seems he may) who is immediately *instituted* and *inducted* into the first, and on that very day, corn is severed, and then the first incumbent, not yet *inducted* but only *instituted* to the second living, sues a parishioner for tithes of that corn, will it not be a bar to his demand for the parishioner to say, You have taken another living by *institution*, and I have paid my tithes to the new parson of our parish who was *instituted* and *inducted* before the tithe accrued, and since your institution to the second living? This (with great deference) would be a good answer, either at law or in equity.

4thly, But supposing for argument's sake he can recover the tithes of the first benefice before *that* church is filled; yet whenever it is filled, he will be obliged by the *stat. 28 H. 8. c. 11.* to pay over and make satisfaction to the new incumbent from the very time the first church became void, which (as hath been before submitted) is upon *institution* to the second living.

Mr. *Watson* (or Mr. *Place* of *Gray's-Inn* who indeed was the true author) in his *Compl. Incumb. 8vo, vol. 2. 748, 9.* in his comment on the *stat. 28 H. 8.* says, "I find but little in all the books relating to this statute, yet I will venture to give my thoughts on questions that may rise upon it (*int' al.*) If the incumbent of one church of the yearly value of 8*l.* accept another, the first is void, so that if he doth continue as incumbent, by serving or providing for the cure, taking the profits, &c. I conceive that he is in the same case, as if upon the death of the incumbent of another church, he should of his own authority enter upon the profits, and serve the cure thereof, as if lawful incumbent that is to say, that he is accountable to the next incumbent, for the profits received by him, and liable to an action upon this statute, if he refuse to satisfy the next incumbent for the same.

So that supposing the pluralist can receive, or sue for the tithes of the first living, it by no means proves that it was not void on his *institution* to the second, for it is for the benefit of his successor that he should take the tithes of the first, until the church be filled, otherwise they might rot upon the ground, when they are set out; and he is plainly obliged by this statute to account for the same to his successor, from the very day of the avoidance.

But it is said the church was not void but only voidable, and that the patron had it in his power to make it void or not.

It

Answer.

It must be submitted with great deference, that the word *voidable* in this case must necessarily mean, that the church may be made void by action or judgment of law in a proper court, and not by any act *in pais* by the patron; for it is laid down by *Coke* in *1 Ro. Rep.* 213. that before a presentation can be made to a church it must be actually void, and its being voidable only is not sufficient; and he cites *Small's case*, *17 Ed.* 3. 59. in these words, "L'Eglise doit estre void devant poet presenter, car si l'eglise soit voidable nul presentation poet estre, mes si soit void *in facto* autrement est"

The true patron in the case at bar might have presented, therefore the church was void the moment *that* right accrued, and not voidable *only*, for then he could not have presented.

Having thus endeavoured to shew, that accepting *institution* to a second, is an absolute cession of the first, before *induction* and before *deprivation*, and that the patron might present to it, as *ad ecclesiam jam vacantem*, and that the *stat.* 21 *H.* 8. has not altered the law in this point, it may fairly be insisted that the church in question was *so* void on the 31st *October* 1759. the day of the institution to the second benefice, that the patron thereof could not afterwards on the 9th of *November* following, transfer the right of presentation (to the church in question) by a grant of the advowson in fee to the plaintiff.

This point was so very clear upon breaking the case on the former argument, that there is not much occasion to speak to it; the cases then cited seem to put the matter out of doubt, *Jenkins Cent.* 236. *Dyer* 282. *1 Leon.* 67. *Co. Lit.* 120.

Jenkins Cent.
236.
Dyer 282.
S. P.
Shepard T.
S. P. 283.

The patron of an advowson of a church being void grants to *B.* *proximam præsentationem* to the said church *jam vacantem*, so that it shall be lawful for *B.* to present to the church for this turn. Resolved by all the judges that this grant is void by a subject; for this avoidance is a thing in action and privity, and vested in the person of the grantor, and is as a relief, or arrearage of rent, or an obligation, or a debt; *presentation* is only a commendation of a clerk to the Bishop, to be admitted to a church being void. *Dyer* 282. S. P.

1 Leon. 167.
S. C.
3 Leon. 256.
S. C.
Owen 85.
S. C.

Cro. Eliz. 173. *Brookesby's case*, *Quare impedit*; upon the declaration it appeared, that a grant of the next avoidance was made to him and one *H. B.* and after the church became void *H. B.* released to the plaintiff all his estate, right and title, and he being disturbed brought a *quare impedit* in his own name only; and after verdict, this matter was alledged in arrest of judgment; that the release after

avoidance

avoidance was void, for it is a thing in action, which cannot be granted or released, from one to another; and so it was adjudged Adams's case, 16 Ed. 3. in quare impedit cited in Boswell's case, 6 Rep. 50. b. which was thus: D. was seised of a manor to which an advowson was appendant, and died; the manor descended to E. an infant; Adams usurped during the infancy of E. E. at full age enfeoffed F. of the manor, afterwards the church became void, and F. presented, and the assignee of Adams brought a quare impedit; and it was adjudged, that by the usurpation, the infant was out of the possession of the advowson; so that by his feoffment of the manor at full age, nothing in the advowson passed to the feoffee, because the feoffor had but a right, and the usurpation was voidable by action, which could not be transferred to a stranger.

To apply this to the present case. At the time of the institution to the second living, the patron had a right to present, and might have had his quare impedit if he had been disturbed; and this right cannot after be transferred by a grant of the advowson in fee to plaintiff.

If a man be seised of an advowson in gross, or in fee appendant to a manor, and the church voids, and he dieth, his executor shall present and not the heir. Bro. tit. Presentation, pl. 34. S. C. F. N. B. 73. 4to. F. N. B. 79. S. P. as to heir in tail.

In the appendix to the Register tit. Brevia Vetera in Officiis clerici Coronæ, et clericorum de cursu in Cancellaria, fol. 43. there is a writ of quare impedit for an executor to present to a church which became void in the life of the testator.

Bro. tit. Presentment, pl. 22. If baron is seised of an advowson in jure uxoris, (as her dower by a former husband) and the church voids, and the feme dies before disturbance, and after, the baron is disturbed, he shall have this presentation, though he be not tenant by the curtesy.

But if the same person be parson of the church, and also be seised in fee of the advowson and dies, the presentation belongs to the heir, and not to the executor, because the descent and avoidance happened the same instant, and the elder right shall be preferred. 3 Lev. 47. Holt v. Episc. Winton'.

Cro. Eliz. 811. Leak v. Bishop of Coventry and Dr. Babington. A. and B. seised in fee of every other turn; A presented, then B. presented, and after induction his clerk is deprived, but no notice is given. The Bishop collates; A. grants his fee to J. S. The

PART II.

E c c

collatee

collatee dies; it is now *B.*'s turn, for *A.* before his grant to *J. S.* (having the right) might have removed the collatee for want of notice, but he dying incumbent, *A.*'s turn is served. But after *A.*'s grant to *J. S.* neither *A.* nor *J. S.* could present; and the collation is good against all but the very patron, who after the grant, could not have action; but he has destroyed it by his grant, and so none can have it.

To apply this to the present case.

Upon the 31st of *October* the true patron might have presented, therefore he had a right to present immediately and before his grant of the advowson to the plaintiff; what is this then? but a grant to a stranger of an immediate right to present; which seems to be the same thing in other words as a grant of a present avoidance, and with great difference the Bishop's collation is good against the plaintiff, *who was a stranger to the advowson on the 31 October when the right of presentation first accrued to the then true patron*; for it seems to be very clear that the true patron *then* had a right to present if he pleased.

From hence it appears, that by the law as it stood before 21 *H.* 8. and by many resolutions since that statute, that upon the *institution* to the second living, the patron of the first had a right to present.

That he can only present to a church which is *void in fact*, and not to one that is only *voidable*.

That a patron having an *immediate* right to present, cannot convey that right, for in other words it would be conveying a present avoidance.

And so the plaintiff has not any title, and therefore cannot have judgment.

Another question is, whether the first living became so void by institution to the second *that the patron* was bound to take notice without notice given.

This point was not much debated upon the former argument; and though it may be doubtful whether the bishop has collated rightfully or not, for want of notice to the patron, yet if the plaintiff has shewn no title in his count, he cannot have judgment.

But it is submitted, the bishop has collated rightfully without giving notice to the former patron or his grantee, if the first living was void by the institution to the second.

The institution to the second living was a cession of the first by the common law, without any deprivation. *Vaugh.* 21. And if this was a cession at common law, the patron is to take notice and present, without expecting notice from the bishop. *Cod.* 834.

It is further submitted, that as this living is above 8*l.* *per ann.* it is void by the *spirit* of the statute of 21 *H.* 8. which is a public law, and if it is a public law the patron is bound to take notice (without notice given him,) and to present within six months at his peril. *Holland's case*, and *Vaugh.* 121. Perhaps it might be otherwise if the living was under 8*l.* *per ann.* because the statute does not extend to those livings.

Upon the whole, the defendants submit it with great deference to the court that the church was void upon institution to the second living, that the patron was obliged to take notice, without notice given to him, and to present within six months after the institution to the second living; and that although both these points should be against the defendants, yet if the plaintiff has no title, he cannot have judgment, for if he recovers, it must be on the strength of his own, and not on the weakness of the defendants title, who are in possession. *Vaugh.* 8, 58, 60.

In reply for the plaintiff it was objected, that it did not substantially appear upon this record that the church was void at the time of the grant of the advowson to the plaintiff, because the day of the date thereof (9th of November 1759.) mentioned in the count is not material, but mere form coming under a *videlicet*; and it not being material, the not denying it by defendants is no admission of it; for *non-denial* only admits those facts which are materially alledged; and it would be extremely hard upon the plaintiff that such an immaterial thing which the defendant may not deny should conclude him; that the time of seisin in a *quare impedit* is immaterial, and seisin generally in the time of peace in the reign of such a King being alledged is sufficient; and it is the constant course to alledge seisin generally. *Skin.* 660. That which is alledged by way of conveyance or inducement to the substance of the matter need not to be so certainly alledged as that which is the substance itself. *Co. Lit.* 303. *a.* The grant to, and seisin of the plaintiff in the present case is the substance, and if the defendants had chose to controvert the plaintiff's title, and insist upon the church being void on the institution to the second living, they ought to have first admitted the grant and seisin of the plaintiff, as alledged in the count, and then gone further and alledged that before the plaintiff *had any thing in the advowson*, the church in question became void, and shewn when and how it became so, and that it continued void until and at the time of the grant to the plaintiff and afterwards until the end

Serjeant Buxland.

Bro. Confes.
35.

end of six months from the time it became void; whereupon the Bishop on such a day collated the church on the defendant *Whitehead*, and then the incumbent *Whitehead* to have traversed, *absque hoc*, that the late incumbent *Thomas Gresley* was instituted to the second benefice after the advowson of the church in question was granted to the plaintiff in manner and form as by the declaration is alleged; & *hoc paratus est verificare*, &c. If the defendants had thus pleaded, and the plaintiff had taken issue upon the traverse, it must have been found for him, if the grant was made before the institution to the second living; if it had been found specially (which most probably would have been the case) that the grant was really made on the day alleged in the count, which was 12 days before the induction to the second living; the matter of plaintiff's title would have come fairly before the court, and the question would have been, whether the church was *so* void upon the institution to the second living that this turn could not pass to the plaintiff after that time by the grant? but as the pleadings now are, the plaintiff has a good title before the institution to the second living, notwithstanding the day of the date of the deed of grant be after it, because the time of the grant is not made material by pleading properly, but the defendants have entirely relied that lapse of time runs from the time of institution and not of induction to the second living, that the day in the declaration is not material. 2 *Stra.* 806. 5 *Niell.* 286. and many other cases.

It was further insisted in reply, that admitting the church was *so* far void upon the institution to the second living before induction, and the patron may take notice of it if he pleases, and present, yet no lapse shall incur in this case against him unless notice be given to him; no more than if the church be void by resignation; according to Lord *Popham* in *Digby's* case, 4 *Rep.* 75, 79.

Upon this argument the whole court seemed to be of opinion that the church was *so* void upon institution to the second living, that the patron might have taken notice thereof and presented if he pleased, but inclined to think that lapse shall not incur from the time of the institution against the patron unless notice be given him, but they thought that lapse would run from the time of induction without notice given him.

The plaintiff's counsel not being aware of the objection with respect to the immateriality of the day of the date of the grant, which is under a *videlicet* in the count, was not prepared to answer it, and therefore that single point was adjourned to be spoke to again.

9th Dec^r

This term, the point reserved for further argument was spoken to again; after which, the court were clearly of opinion, that the day of the date of the deed of grant in the count coming under a *widelicet*, and being never taken notice of again in any part of the pleadings, was totally immaterial, and so the plaintiff had shewn a good title; and they were also clearly of opinion that the church was so void upon *institution* to the second living, that the patron might present immediately thereupon if he pleaded; but that the Bishop had no right to collate by lapse without giving notice; and therefore, without saying any more, they unanimously gave judgment for the plaintiff: which was afterwards *affirmed upon a writ of error in the King's Bench*.

Before judgment was given in the above case, the defendants moved for leave to amend their pleas, in order to have put their defence upon the plaintiff's defect of title, and not upon lapse of time; but the court refused it, because it was a total changing of their defence, and was not like an amendment, but was making new pleas; the amendment intended to have been made was, to have concluded the Bishop's plea in the following manner: and the said Bishop further saith, that the said *Thomas Gresley* being so admitted instituted, and inducted into the said north mediety of the said church of *Great Sheepy*, and being incumbent thereof, he the said *Thomas Gresley* afterwards, and before the making of the said indenture in the said declaration lastly mentioned, and before the said *Edward* had any thing in the said advowson of the said north mediety of the church of *Great Sheepy* aforesaid, to wit, on the 31st day of October in the year of our Lord 1759. at *Great Sheepy* aforesaid, accepted and took the said other benefice with cure of souls of the yearly value of 8 l. to wit, the said rectory of the parish church of *Seale* aforesaid, otherwise called *Nether Seale* in the said county of *Leicester*, and the said *Thomas Gresley* was afterwards admitted and instituted into the same before the making of the said indenture in the said declaration lastly mentioned, and before the said *Edward* had any thing in the said advowson of the said north mediety of the said church of *Great Sheepy* aforesaid, to wit, on the said 31st day of October in the year of our Lord 1759. that is to say, at *Great Sheepy* aforesaid, whereby and by force of the statute aforesaid in such case made and provided, the said north mediety of the said church of *Great Sheepy* aforesaid became vacant, and remained, continued and was so vacant until and at the time of the making of the said indenture in the said declaration lastly mentioned, and afterwards until the end and expiration of six months from the time that the said *Thomas Gresley* accepted and took the said rectory of the said church of *Seale*, otherwise *Nether Seale*, and was admitted and instituted into the same as aforesaid, whereby the right of collating the said north mediety of the church of *Great Sheepy* aforesaid

Pro. quer.
Bro. tit. Confession, pl. 41.
2 H. 7. 16.
Hob. 199.
1 Leon. 41.
1 Inst. 352.
12 Mod. 578.
Cro. Car. 501.
Yelv. 123.
Cro. Ja. 202.
2 Rol. Rep. 22.
Judgment for the plaintiff.
Brownl. 140.
1 Carth. 389.
Yelv. 141.
2 Salk. 560, 561.
Pro. Def.
Bro. tit. Obligation pl. 60.
Traverse 368.
Yelv. 52.
Cro. Car. 501.
The court refused to permit the defendants to alter their pleas so as to change their first defence.

saïd devolved to the saïd Bishop as ordinary of that place by reason of the lapse of time as aforesaid, wherefore the saïd Bishop, after the saïd six months from the time that the saïd *Thomas Gresley* accepted and took the saïd rectory of the church of *Seale*, otherwise *Nether Seale*, and was admitted and instituted into the same were lapsed, that is to say, on the 20th day of *June* in the year of our Lord 1760. at *Great Sheepy* aforesaid, collated the saïd north mediety of the church of *Great Sheepy* aforesaid, so being vacant on the saïd *Thomas Whitehead* his clerk, and caused the saïd *Thomas Whitehead* to be instituted and inducted into the same, in the time of peace in the time of the Lord *George* the second, late King of *Great Britain*, &c. by reason whereof the saïd *Thomas Whitehead* from thence hitherto hath been and still is parson of the saïd north mediety of the saïd church of *Great Sheepy* imparsoned in the same; and this the saïd Bishop is ready to verify; wherefore he prays judgment if the saïd *Edward* ought to have his aforesaid action against him, &c.

N. The defendant *Whitehead*'s plea ought to have concluded in like manner as the Bishop's plea, only with this difference, that it ought to have traversed (at the latter end thereof) *absque hoc*, that the saïd *Thomas Gresley* was instituted into the saïd rectory of the church of *Seale* aforesaid, after the saïd moieties of the saïd advowson of the north mediety of the saïd church of *Great Sheepy* were or either of them was granted to the saïd *Edward*, in manner and form as by the saïd declaration above is supposed; *et hoc*, &c. wherefore, &c.

Michaelmas

Michaelmas Term

4 Geo. 3. 1763.

Wilkes Esq; *versus* Wood, Esq; Member of Parliament. C. B.

THIS was a proceeding by bill against the defendant, which was of *Easter* term last, and in *Trinity* term last the defendant pleaded the general issue, whereupon issue was joined *that* term; the paper book of the issue has been delivered to the defendant's attorney, whereby the whole proceedings in this cause appear to be of *Trinity* term, without any continuance from *Easter* to *Trinity*, or any *alias prout patet*, which is irregular; this being a proceeding by bill of *Easter* term; and therefore it is now moved that the issue as delivered may be set aside for this irregularity. On shewing cause,

Want of a continuance in the issue book delivered may be entered at any time on the roll.

2 Vent 69.
1 Brown's Entr. 26.

Curia: This is a nice objection, it is mere matter of form; and we think the continuance, or *alias prout patet*, are not necessary in the issue paper, it may be entred at any time upon the roll. The rule to shew cause was discharged.

White *versus* Shaw. C. B

THIS was trespass, assault and battery, whereupon the plaintiff declared, that *whereas* the defendant 4 December 1762. at *Leeds* made an assault upon the plaintiff, &c. The defendant demurred, and shewed for special cause, that the supposed assault in the *count-part* of the declaration is not charged expressly or positively, but only by way of recital.

Quod eum in trespass well enough on a special demurrer.

2 Lev 206.
2 Bull. 206.
2 Show. 27.
295, 447.
2 Salk. 636.

Serjeant *Hewitt* for the defendant insisted that this, being shewn for special cause of demurrer, is bad; and cited *Amyon v. Shore*, 1 *Stra.* 624. *B. R.* where it was ill after a verdict and judgment arrested; and 2 *Barnes* 360, 361. *C. B.* where this is held to be ill upon a special demurrer, though the court in that case held it well enough after a verdict.

1 Sid. 187.

150.

1 Lut. 1509.

Cro. El. 185.

198.

2 Vent. 153.

2 Lut. 1180.

Serjeant *Sayer* for the plaintiff insisted, that although this might be bad in a proceeding by bill in the King's Bench, yet in this court where the writ is set forth in the declaration, and is part thereof, the count is helped and made good by the writ; the case cited from *Barnes* 360. of *Douglas* and *Hall* was argued in *B. R.* upon a writ of error, *Trinity* 18 & 19 Geo. 2. by Mr. *Stracey* for the plaintiff, and serjeant *Draper* for the defendant in error, when the court were very much inclined to get over this objection, and said that they thought the count was helped by the writ; and *Denison* J. said, he thought they might reject the word *whereas* as surplusage, as the court frequently does where a man's name is mistaken in the declaration, and that he was glad to see the court inclined to get over this frivolous objection; it was not then determined, but ordered to be spoken to a second time; but it never was, the plaintiff in error seeing the court so strongly inclined to affirm the judgment of the *C. B.* (See my report of this case in *B. R.*)

576. 381.
2 Jones 197.

Curia: Perhaps if this had been a proceeding by bill in *B. R.* it might have been ill, according to the case in *Stra.* 621. where it was ill after a verdict; but in this court, where the writ is set out in the declaration, the count (we think) is helped thereby, and the plaintiff must have judgment.

Wilkes, Esq; *versus* Wood, Esq; Member of Parliament. C. B. 10th of November.

Leave to withdraw the general issue, and plead a special plea upon terms, and waiving privilege of parliament.

IN trespass, assault and imprisonment, the defendant pleaded the general issue, whereupon issue was joined last term, and notice of trial given for tomorrow the 11th of *November*. On *Monday* last the 7th of *November* the defendant moved for leave to withdraw his plea of the general issue, and to plead again the general issue, and a special justification under a warrant of Lord *Halifax* secretary of state; and relied upon the case of *Taylor* against *Joddrell* *B. R. Mich.* 23 Geo. 2. where, in imprisonment the defendant had pleaded the general issue, the court gave him leave to withdraw that plea, and plead a justification that he was master of a ship, that plaintiff was making a mutiny therein, and so he imprisoned him, upon terms of taking short notice of trial, and giving plaintiff judgment of the same term. The like was done in *Blackburn* and *Matthews*, *Trin.* 23 Geo. 2. *B. R.* and in many other similar cases, where the court could prevent the plaintiff from being delayed, or suffering any inconvenience.

Serjeant *Glynn* for the plaintiff, objected that the defendant could not, by coming into the usual terms, put the plaintiff into the same

same situation he was now in, the privilege of parliament taking place next *Monday*; whereupon defendant agreed to waive his privilege; but it was answered by *Glynn*, that the privilege of a member was the privilege of the whole house, and that he could not waive it without leave of the house; and that the house might insist upon the privilege.

Curia: We will not suppose any thing so dishonourable in the house of commons, let the rule be made absolute upon defendant's taking short notice of trial, and that if the plaintiff has a verdict, he shall have judgment of this term.

Wilkes against *Webb* Esq; member, &c. the like motion, and the like rule.

Huckle *versus* Money. C. B.

TRESPASS, assault and imprisonment; issue joined upon the general issue Not guilty, tried before the Lord Chief Justice, when it was proved for the plaintiff that he is a journeyman printer, and was taken into custody by the defendant (a King's messenger) upon suspicion of having printed the *North Briton*, number 45; that the plaintiff kept him in custody about six hours, but used him very civilly by treating him with beef steakes and beer, so that he suffered very little or no damages; the defendant attempted to justify under the general warrant of a secretary of state, to apprehend the printers and publishers of the said *North Briton*, number 45. (which is before set forth at length in the case of *The King and Wilkes*, *Easter term* 3 *Geo.* 3.) by virtue of the *stat.* of *Jac.* 1. and the *stat.* 24 *Geo.* 2. *cap.* 44. but was over-ruled by the Lord Chief Justice; whereupon the King's counsel who were advocates for the defendant tendered a bill of exceptions, which has not yet been argued; the jury gave 300*l.* damages.

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A new trial for excessive damages in assault and imprisonment refused.

It was now moved by serjeant *Whitaker* that the verdict might be set aside and a new trial had; for that it appeared upon the evidence the plaintiff was only a journeyman to *Leech* the printer at the weekly wages of a guinea, that he was confined but a few hours, and very civilly and well treated by the defendant, so that 300*l.* were most outrageous damages in this case, and a new trial he hoped would be granted; and cited *Chambers v. Robinson*, 1 *Stra.* 691. which was an action for a malicious prosecution upon an indictment wherein the jury gave 1000*l.* damages, and the court granted a new trial for the excessiveness of the damages; several other similar cases were cited to induce the court to grant a new trial.

Serjeant *Burland* for the plaintiff, insisted that in cases of *Tort*, which sound merely in damages, and are not like *debt* or *assumpsit*, the court will never interpose in setting aside verdicts for excessive damages; that in the case of *Leeman* against *Allen* and others, reforming constables, *C. B.* in an action of trespass and imprisonment, the jury gave 300*l.* damages; and this court refused to grant a new trial though the plaintiff had not been imprisoned above 24 hours. And in a late case in *B. R.* for criminal conversation 500*l.* damages were given against a man in very poor circumstances, as appeared to the court by affidavit, and yet they would not grant a new trial, but said they could not interpose in cases of tort, unless the damages were very outrageous; but that the jury were the sole judges of the damages.

Lord Chief Justice: In all motions for new trials, it is as absolutely necessary for the court to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure of damages in actions of *tort*; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; *torts* or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c. the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be and generally are considered by a jury in giving damages; the few cases to be found in the books of new trials for *torts*, shews that courts of justice have most commonly set their faces against them; and the courts interfering in these cases would be laying aside juries; before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

I shall now state the nature of this case, as it appeared upon the evidence at the trial; a warrant was granted by Lord *Halifax*, secretary of state, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the *North Briton*, number 45. without any information or charge laid before the secretary of state, previous to the granting thereof, and without naming any person whatsoever in the warrant; *Carrington*, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that *Leech* was the printer of the *North Briton* number 45. directed the defendant to execute the warrant upon the plaintiff (one of *Leech*'s journeymen), and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness

considerableness of his station and rank in life did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's counsel, and saw the solicitor of the treasury, endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no *Englishman* would wish to live an hour; it was a most daring public attack made upon the liberty of a subject: I thought that the 29th chapter of *Magna Charta*, *Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale iudicium parium suorum vel per legem terra, &c.* which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the solicitor general's argument. Upon the whole I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

Bathurst Justice: I am of my Lord's opinion, and particularly in the matter of damages wherein he directed the jury that they were not bound to certain damages; this is a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers, have had verdicts for 200*l.* in each cause by consent, after two of the actions were fully heard and tried. *Clive* Justice absent.

Per Curiam, new trial refused.

Hilary

Hilary Term

4 Geo. 3. 1764.

Sullivan *versus* Stradling. C. B.

1 Bing 38
7a & 843

Replevin.
Avowry for
rent for en-
joyment of
land under a
parol demise.

Cognizance
for the like
by leave of
the court.

IN replevin for taking and unjustly detaining two heifers of the plaintiff; the defendant first avows that the place in which, &c. is two acres of meadow land lying and being at a place called *Taps Corner* in the parish of *Lyng* in the county of *Somerset*, and that one *James Harris* for two years ended the second day of *February* 1761. and from thence until and at the same time when, &c. enjoyed the land in which, &c. as tenant thereof under a demise made to him by the defendant at the yearly rent of 2*l.* 2*s.* payable to the defendant yearly on the 2d day of *February* in every year, and because 4*l.* 4*s.* of the rent for the said two years ended on the 2d day of *February* aforesaid in the year last aforesaid on that day and year, and also at the said time when, &c. were in arrear and unpaid to the defendant, the defendant well avows the taking of the cattle in the place in which, &c. and justly, &c. for and in the name of a distress for the rent so in arrear and unpaid, which rent still remains due and in arrear to the defendant; and the defendant for further cognizance by leave of the court, &c. as bailiff of *John Phillips* well acknowledges the taking of the cattle in the place in which, &c. and justly, &c. because he says that the said place at the time when, &c. and long before was two acres of meadow land lying and being at a place called *Taps Corner* in the county aforesaid, and that the said *James Harris* for two years ended on the 2d day of *February* 1761. and from thence until and at the time when, &c. enjoyed the said land in which, &c. under a demise thereof before made to him by the said *John Phillips* at the yearly rent of 2*l.* 2*s.* payable yearly on the 2d day of *February* in every year, and during all that time held the same of the said *John Phillips* by virtue of the said demise as his tenant thereof at the rent aforesaid payable as aforesaid, and because 4*l.* 4*s.* of the rent for two years ended on the 2d day of *February* in the year last aforesaid, and also at the said time when, &c. were in arrear and unpaid to the said *John Phillips*, the said defendant as bailiff

liff of the said *John Phillips* well acknowledges the taking of the said cattle in the place in which, &c. and justly, &c. for and in the name of a distress for the said rent so in arrear and unpaid, and which rent still remains due in arrear and unpaid to the said *John Phillips*, &c.

And the plaintiff as to the defendant's avowry says that the defendant, for any thing by him therein alledged, ought not to avow the taking of the cattle in the place in which, &c. to be just, because he says that the defendant at the time when, &c. of his own wrong, and without any such cause as the defendant hath in his avowry alledged, took the cattle of the plaintiff in the place in which, &c. and unjustly detained them in manner and form as the plaintiff hath above complained against him; and this the plaintiff prays may be inquired of by the country, and the defendant doth the like. And the plaintiff, as to the cognizance of the defendant, says, that the plaintiff for any thing by the defendant in that cognizance alledged ought not as bailiff of the said *John Phillips* to acknowledge the taking of the cattle in the place in which, &c. to be just, because he says that the defendant at the time when, &c. of his own wrong and without any such cause as he hath in his cognizance alledged took the cattle of the plaintiff in the place, in which, &c. and unjustly detained them, in manner and form as the plaintiff hath above complained against him: and this the plaintiff prays may be also inquired of by the country; and the defendant doth the like, &c. and the plaintiff for further plea as to the avowry of the defendant by leave of the court, &c. further says, that the defendant for any thing by him in that avowry alledged ought not to avow the taking of the cattle in the place in which, &c. to be just, because he says that at the time when the defendant is above supposed to have made the demise in the avowry mentioned, of the said meadow land, he had not any estate in the said meadow land, whereby he could make such demise to the said *James Harris*; and this he is ready to verify; wherefore inasmuch as the defendant hath acknowledged the taking of the cattle in the place in which, &c. he prays judgment and his damages by reason thereof to be adjudged to him, &c. and the plaintiff for further plea, as to the cognizance of the defendant, by leave of the court, &c. says, that the defendant for any thing by him in that cognizance alledged ought not as bailiff of the said *John Phillips* to acknowledge the taking of the cattle in the place in which, &c. to be just, because he says that at the time when the said *John Phillips* is supposed to have made the demise in the cognizance mentioned of the said meadow land, he the said *John Phillips* had not any estate in the said meadow land whereby he could make such demise to the said *James Harris*; and this he is ready to verify; wherefore in as much as the defendant hath acknowledged the taking of the said cattle in the place in which,

Plea to the avowry that defendant took the cattle of his own wrong.

Issue to the country.

The like plea to the cognizance.

Issue to the country.

Plea in bar to the avowry by leave, &c. that the defendant nil habuit in tenementis.

The like plea in bar to the cognizance by leave, &c.

PART II.

H h h

&c.

&c. he prays judgment and his damages, by reason of the taking and unjustly detaining the cattle, to be adjudged to him, &c.

Demurrer to
the plea in
bar to the
avowry.

Special cause
of demurrer.

Demurrer to
the plea in
bar to the
cognizance.

Special causes
of demurrer.

Joinder in de-
murrer as to
the avowry.

The like as to
the cogni-
zance.

And the defendant says, that the plea of the plaintiff by him secondly pleaded in bar to the avowry, and the matters therein contained, are not sufficient in law to bar the defendant from avowing the taking of the cattle in the said place in which, &c. to be just; to which said plea, in manner and form as the same is pleaded, the defendant has no necessity, nor is bound by the law of the land to answer; and this he is ready to verify; wherefore for want of a sufficient plea in bar the defendant prays judgment and a return of the cattle, together with his damages, &c. according to the form of the statute, &c. to be adjudged to him, &c. and for causes of demurrer in law, the defendant shews to the court the following causes, viz. for that the plaintiff hath not by his said plea in bar admitted, traversed or denied the demise mentioned in the avowry to have been made by the defendant, but hath attempted to introduce a collateral issue that the defendant had not power to demise the premisses; and for that the said plea is only argumentative, uncertain, insufficient, and wants form, &c. and the defendant as to the plea of the plaintiff by him secondly pleaded in bar to the cognizance of the defendant says, that he by reason of any thing by the plaintiff in that plea alledged, ought not to be barred from acknowledging as bailiff of the said *John Phillips* the taking of the said cattle in the place in which, &c. to be just, &c. to which plea, in manner and form as the same is pleaded, the defendant hath no necessity, nor is bound by the law of the land to answer; and this he is ready to verify: wherefore for want of a sufficient plea in this behalf the defendant prays judgment and a return of the cattle, together with his damages, &c. according to the form of the statute, &c. to be adjudged to him, &c. and for causes of demurrer in law the defendant shews to the court the following causes, viz. for that the plaintiff hath not by his said plea admitted, traversed or denied the demise mentioned in the cognizance to have been made by the said *John Phillips*, but hath attempted to introduce a collateral issue that the defendant had no power to demise the premisses; and for that the said plea is only argumentative, uncertain, insufficient, and wants form, &c.

And the plaintiff says that the plea by him secondly above pleaded in bar to the avowry, and the matters therein contained, are good and sufficient in law to bar the defendant from avowing the taking of the cattle in the place in which, &c. to be just; which plea and the matters therein contained, the plaintiff is ready to verify; and because the defendant to the said plea hath not answered, nor the same in any manner denied, the plaintiff prays judgment, &c. and the plaintiff says that his plea secondly above pleaded in bar to the cognizance of the defendant, and the matter therein alledged are

are good and sufficient in law to bar the defendant from making cognizance as bailiff of the said *John Phillips*, of taking the cattle in the place in which, &c. to be just; which said plea, and the matter thereof, the plaintiff is ready to verify; and because the defendant to the said plea hath not answered, nor in any manner gainsaid, the plaintiff as before prays judgment, &c.

This case was twice solemnly argued at the bar, by serjeant *Burland* for the defendant, and serjeant *Glyn* for the plaintiff, in *Trinity* term last; and in this term by serjeant *Davy* for the defendant, and serjeant *Hewitt* for the plaintiff.

Nil habit in
tenementis is
no plea in bar
to an avowry
under the stat.
11 Geo. 2.
c. 19.

Serjeant *Burland*. The avowry and cognizance in this case is given to landlords by the *stat. 11 Geo. 2. cap. 19.* intituled An act for the more effectual securing the payment of rents, and preventing frauds by tenants, whereby it is enacted, "That whereas great difficulties often arise in making avowries or conusance upon distresses for rent, quit rents, &c. it shall and may be lawful to and for all defendants in replevin to avow or make conusance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due;" this clause in the statute has taken away the tenant's right to controvert the defendant's title in replevin; if it has not, and he be obliged to shew his title in the replication to the plea in bar, it has occasioned a greater prolixity in pleadings in replevin than there was before, for at common law the landlord or avowant was obliged to set out his title in his avowry or conusance at first

to turn the principle of
this case it appears
that the tenant's defence
the Repl: of D. is: and
provision to this general
avowry cannot impugn
his Landlord's title.

It may be said perhaps that the avowant might have replied, that at the time of the demise he had a good and sufficient estate in the land whereby he could make such demise, and that this would have been a good issue, without setting out the title; but this would have been a bad replication, according to *Gyll* against *Glass*, *Yelv.* 227. *Cro. Jac.* 312. S. C. In debt, the plaintiff declared upon a lease for years made by himself to the defendant of lands in *E.* rendering so much rent, and for so much in arrear at such a feast he brought the action. The defendant (the lease not being by indenture) pleaded that the plaintiff at the time of the demise had nothing in the tenements whereof he could make the said demise; the plaintiff replied and said that at the time of the demise he had a good and sufficient estate in the said tenements whereof he could make the demise, and thereupon being at issue and found for the plaintiff, he had his judgment. The defendant brought error, and assigned for error, that this replication was not good, for he ought

to

to have shewn specially what estate he had at the time of the demise, so that the court might judge that he had sufficient in the lands whereof to make the lease; and the court held that the replication was not good, and that the defendant might well have demurred for that cause; but judgment was affirmed, for the verdict found for the plaintiff hath made the replication good, for the court is now ascertained that the plaintiff had an estate whereof he could make the demise. And in 3 Lev. 193. *Aylett against Williams*, in covenant upon a deed not indented, and declared upon a lease of land to defendant rendring rent, and a covenant to pay it, and assigned a breach in non-payment of the rent; the defendant protesting that he did not enter and enjoy the land as the plaintiff had supposed, for plea said, that the plaintiff *nil habuit in tenementis tempore dimissionis*; the plaintiff replied, that *habuit bonum titulum unde potuit dimittere*; the defendant demurred generally, and the court held the replication ill in not shewing what title he had; according to 2 Cro. 312. this was not by indenture.

The *stat. 11 Geo. 2.* was made for the benefit of landlords, “ and to obviate some difficulties that many times occur in the “ recovery of rents where the demises are not by deed; that it shall “ and may be lawful for landlords, where an agreement is not by “ deed, to recover satisfaction for the tenements occupied by the “ defendant or defendants in an action on the case for the use and “ occupation of what was so held or enjoyed; and if in evidence “ on the trial of such action any parol demise, or any agreement “ (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, “ but may make use thereof as an evidence of the *quantum* of the “ damages to be recovered.” Before this statute, landlords were under great difficulties in getting their rents of tenants who had enjoyed under a parol demise, or some little memorandum in writing; and in actions on the case for the use and occupation, were often nonsuited, which difficulty this statute has removed, and now they are safe, and may either bring an action on the case for the use and enjoyment, or may distrain upon these parol demises, and avow according to the statute without setting out a title.

This plea of *nil habuit in tenementis* is bad in this case, as it also certainly is, in an action on the case upon an *assumpsit* for the use and occupation of lands; as was determined in *Lewis against Willis B. R. Hilary 25 Geo. 2.* and in *Richards against Holditch, Hilary 13 Geo. 1.* *Newsome against Dugdale Banco R.* term 1761. was the like avowry to the present; the plaintiff pleaded in bar to it *nil habuit in tenementis*, &c. defendant replied *quod habuit* a sufficient estate to demise, and concluded to the country; the court held the plea bad, and judgment was for the avowant; this was between landlord and tenant.

Serjeant

Serjeant *Glynn* for the plaintiff: The main question is, whether the *stat. 11 Geo. 2.* was intended to take away the lessee's right at common law to controvert the lessor's title and authority to make the demise in cases where the lease is not by deed indented; I conceive that it was not; it has given the lessor a new avowry, but has not taken away the lessee's right to plead this plea of *nil habuit, &c.* and to put the lessor to shew he had such an estate, whereof he could make the demise; according to *Lit. sec. 58.* "In case of a distrefs or debt for rent, it behoveth that the lessor be seised of the same tenements, at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease; and *Coke Lit. 47. b.* says, the reason of this is, for that in every contract there must be *quid pro quo*, and if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent; and in that case he may also plead that the lessor *non dimisit*, and give in evidence the other matter; but *Littleton* says, this is the plea, *except* the lease be made by deed indented, in which case this plea lieth not for the lessee to plead, for then, are both parties concluded; but if it be by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made. *Co. Lit. 47. b.*" It is absolutely necessary that the lessor have seisin of the land at the time of making the lease and a lease made by a man before entry was held to be void. *2 Ld. Raym. 853. West v. Sutton.* I do admit that in an *assumpsit* for the use and occupation, *nil habuit in tenementis, &c.* is no plea, for that depends merely upon an implied contract, and the promise is raised by implication of law, upon proof of the use and enjoyment by the defendant; but *per Lee C. J.* in case of a demise it is otherwise, because a seisin and a right to make the lease, is the foundation of the action for rent. *Richard v. Holdin, 13 Geo. 2. B. R.* And I also conceive that in this case a general replication that the defendant had such an estate whereby he could make the demise would be a good issue, at the trial whereof the single question would be, whether he had such a seisin as would intitle him to the rent.

Burland Serjeant: This an improper plea to come out of the mouth of one who has received the profits and enjoyed the land.

Lord Chief Justice: I desire I may be understood not to be bound by what I shall now say, because the case is to undergo a second argument. This is not a case between the landlord and tenant, but between a stranger and the landlord, a replevin for taking the cattle of a stranger, and therefore I doubt whether the landlord shall have this general avowry, by the *stat. 11 Geo. 2.* against a stranger to the demise, but am inclined to think he shall, because the words of the statute are general and universal, *viz.* "It shall be lawful for all

“ *defendants in replevin* to avow or make conuſance generally, &c. and therefore, whether the plaintiff be tenant or not, the form and manner of the avowry given by the ſtatute is the ſame. It was ſaid by my brother *Glynn* that *nil habuit in tenementis* was a good plea to a demife without deed, and that if the leſſor has nothing, the tenant is not ſafe in paying him the rent, becauſe he may be ſued for it again by the right owner of the land; and that the ſtatute could never intend to take away the right to controvert the leſſor’s title and ſubject the leſſor to the danger of being liable to pay his rent twice; but yet when I conſider the form of the avowry which the legiſlature has marked out to be full, perfect and compleat, I cannot help thinking but they intended to take away the plea of *nil habuit*, &c. as if they had ſaid, after a tenant has enjoyed the land by a demife or permiſſion of the landlord, he ſhall not be permitted to pry into the title, and pick holes in ſettlements and wills; what has a tenant to do with the title, as between him and his landlord after enjoyment? I ſuppoſe alſo, that this form of avowry was given, to prevent the difficulty the landlord was under to recover his rent when the eſtate was in mortgage, and therefore it ſeems to me that this plea of *nil habuit*, &c. is taken away.

But it is ſaid that a general replication *quod habuit in tenementis* a ſufficient eſtate whereof he could demife, would be good, but this has been determined to the contrary; the iſſue would be too large, and the inconvenience to landlords would be the ſame, if not greater. It is very true that *nil habuit*, &c. is no plea in an action for the uſe and occupation, becauſe that is only upon a mere contract or agreement, not upon a demife; upon the whole, as at preſent adviſed, I think this plea of *nil habuit*, &c. a bad one, as it is taken away by the ſtatute in my opinion.

Clive Juſtice: This is a new caſe; if *nil habuit*, &c. be a good plea, and a general replication *quod habuit*, &c. whereof he could demife, without ſetting out what eſtate he hath, would be a good replication, it would be impoſſible for a landlord whoſe eſtate at the time of the demife was in mortgage to get any rent; and the ſtatute was made to prevent that difficulty, as well as many other miſchiefs to landlords, as prying into titles, family ſettlements and wills to pick holes in them, as my Lord has well obſerved; and I am very clearly of opinion, that this is a good avowry, and that the ſtatute has taken away the plea of *nil habuit*, &c. in this caſe of a replevin.

Bathurſt Juſtice; This ſtatute was made for the benefit of landlords, and to prevent tenants from putting them to difficulties (after enjoyment of the lands,) in recovering their rents under parol demises or agreements; for before this ſtatute, in actions for the uſe and

and occupation, landlords were continually nonsuited, by the tenants proving some parol demise, or memorandum in writing, amounting to a demise at the trial, for in that case the landlord ought to have brought an action of debt, and not case on *assumpsit*, which is now remedied by this statute. It is very certain that *nil habuit, &c.* is no plea at law to an *assumpsit* for the use and occupation; and in the present case the plaintiff might have pleaded to this avowry, that the tenant *Harris* did not enjoy, &c. under any demise of the avowant; and that is the only honest defence, in my opinion, that can be set up in this case. In *replevin* where the avowant in case of distress for rent set out his title specially in his avowry, I think the plaintiff at common law could not plead *nil habuit in tenementis, &c.* but was obliged to traverse or deny his title set out in the avowry, or to confess and avoid it by shewing a title paramount in himself, or somebody else, or by pleading that no rent was in arrear; and indeed *nil habuit, &c.* in such a case would be nonsensical and absurd; for it would be to call upon the avowant to set out his title again in his replication, which he had before done in his avowry; and would be no answer at all to the avowry, because *nil habuit, &c.* to an avowry upon title at common law, neither confesses and avoids, or traverses and denies the avowant's title. Upon the whole as at present advised, I am of opinion that the plea in the present case is ill, and that if it was not so, yet that a general replication *quod habuit, &c.* whereby he could make the demise, would be ill.

Gould Justice: As this matter is to be spoke to again, it will be proper to consider the occasion of making the statute.

Upon the 2d argument in this term,

Serjeant *Davy* for the avowant, argued to the like effect as *Burland* had done before; as he cited no new cases, his argument need not be repeated, though, I must say, it was a very good one.

Serjeant *Hewitt* for the plaintiff; The statute of 11 Geo. 2. is confined to difficulties which often arise in making avowry or conusance upon distresses for rent; that it shall be lawful for all defendants in replevin to avow or make conusance generally, that the plaintiff in replevin, or other tenant of the lands, whereupon such distress was made, enjoyed the same under a demise, &c. but in the present case, the plaintiff is a stranger, and never enjoyed the lands.

Curia: The statute is in the disjunctive, or *other tenant, &c.* and *Harris* was *other tenant*, and enjoyed the lands.

Hewitt: This plea of *nil habuit in tenementis, &c.* in debt or covenant for rent upon a lease by deed poll, is good, and there is no doubt

doubt but that the tenant might controvert the lessor's title; and if he had no title, the distress for rent could not be justified or supported, for he ought not to have the rent, which in truth belonged to another person; the statute was made to remedy difficulties in making avowries and conusances, but not to alter the law so much as to give a man a title to rent when he had none. By *Coke Lit. sec. 58. & 47. b.* there must be *quid pro quo*, and if the lessor had nothing, he could give nothing; the statute could not intend to strip the tenant of his defence from being liable to pay the rent twice.

In the case of *Wilson and Field, Skin. 624.* at *Guildhall*, in debt for rent upon a demise for years the defendant pleads *nil habuit in tenementis*; the plaintiff replies that he had a good and sufficient estate to make the demise to the defendant *modo & forma, &c. scilicet*, that he was seised in his demesne as of fee; upon which issue is joined; and upon evidence it was objected that he ought to shew an estate in fee; *sed non allocatur*; for the issue is joined upon the good and sufficient estate to make the demise; and any estate is sufficient for this purpose, out of which the estate demised is derived; and all added after the *scilicet* is but form; but if he had not said, that he had a good and sufficient estate, but only had said that he was seised in his demesne as of fee, then he had been restrained to prove such estate. *Per Holt Chief Justice.*

The case of *Newsome against Dugdale, Mich. 30 Geo. 2. B. R.* I argued; it was in replevin, and the avowry was like this; the plaintiff pleaded in bar that the defendant took the cattle *de injuria sua propria, &c.* and that he had not any thing in the lands whereby he could make the demise mentioned in the avowry; the defendant replied that he had a good and sufficient estate to make the demise to the plaintiff *modo & forma, &c. scilicet*, that he was seised in his demesne as of fee, exactly as in the case in *Skin. 624.* before mentioned; the plaintiff demurred to the replication, and shewed for cause, that it shews no certain title in the defendant at the time of the demise; but the court held it sufficient, and there was judgment for the avowant; the court did not determine upon the avowry, or replication, but said they thought them both good, and therefore whether *nil habuit, &c.* was good or ill, *quâcunque viâ data*, the avowant must have judgment; this case shews that a general replication *quod habuit, &c.* like the case in *Skin. 624.* is good; but I own they did not determine whether *nil habuit, &c.* was a good plea in this case.

Chief Justice: Surely, either the plea was good, and the replication ill, or the plea was bad and the replication good in that case.

Hewitt,

Hewitt. The single question was, whether the replication was good or not; and the *stat.* 11 Geo. 2. was not mentioned. Upon the whole, if the lessee cannot have this plea, and the lessor had not title at the time of the demise, the lessee may be liable to pay the rent twice over.

Lord Chief Justice. This is a new and important case; and before we give judgment, we must well consider this statute of 11 Geo. 2. and take care that the landlord may have every advantage which is thereby given to him, and that the tenant also may have every advantage of pleading which he had at law, if it be not taken from him by the statute.

It is admitted on both sides, that *nil habuit in tenementis* in debt or covenant for rent upon a lease (not by deed indented) is a good plea; if the landlord has no title to demise, the tenant hath not *quid pro quo*, and must pay the rent to the true owner of the land; is it just that I shall be bound to pay the rent twice over? it is no answer to say, I can recover my money back again; and unjust to compel a man to pay money which is not due; if the lease be by indenture the lessee is concluded, and his mouth is stopped to say the lessor *nil habuit*, &c. Estopples are not much favoured in the law, because they go through just and unjust cases. Why did the legislature confine this matter to an avowry upon a distress for rent, and not extend it to debt and covenant upon a lease (not indented) for rent? Did they intend to overturn justice, and the common law in one case, and not in the other, which is not so much as hinted at in the statute? it says the avowant may avow as before is mentioned; does it follow that if the tenant by his plea in bar calls upon the lord to set out his title, that he is not still obliged to set it out in his replication?

It is objected that the plaintiff shall not call upon the landlord to set out that matter in his replication, which the statute says he need not do in his avowry for rent distrained; before this statute, if the landlord had replied *quod habuit*, &c. as in *Cro. Jac.* 312. *Yelv.* 227. 3 *Lev.* 193. *Skin.* 624. and upon that issue a verdict had been, it would have been a good replication, though perhaps bad upon a demurrer; the statute having varied the avowry in a distress for rent, why may not the court introduce a new way of pleading in reply? At common law *nil habuit*, &c. would have been a bad plea to an avowry, because it had set out the title before, but good in debt and covenant for rent (on a lease not indented) and I think it ought to be held good in the present case since the statute, and that the general replication *quod habuit*, &c. should be held good also. If I am right, we must adopt this new plea and replication; as to the case of an *assumpsit* for the use and occupa-

tion, I lay that out of this case, it being upon a mere personal contract, and not like a demise which passes an interest in land; upon the whole I think the plea is good, and that the statute has not deprived the lessee of his right at common law, of calling upon the landlord to shew his title and power to demise.

Clive Justice: I am still of opinion that *nil habuit, &c.* is a bad plea in this case, and that the tenant is estopped by the statute, to call upon the landlord to shew his title in reply.

Bathurst Justice: Before I heard my Lord Chief Justice give his opinion, I was clear this is a bad plea; and I am still of the same opinion as at present advised; but it will be proper to take further time to consider, as it is a matter of great consequence.

This statute was made for the advantage of landlords; but if this be a good plea, and the general replication *quod habuit, &c.* be good, the issue will be too large, and the landlord may be turned about by any little flaw, and it would have been better for him that this clause had not been in the statute; for before the statute the issue upon title turned upon a single point of fact, but by introducing this manner of pleading, every fact in the landlord's title will be in issue, which will put him under infinite difficulties, which I think the statute was made to prevent.

Gould Justice: I admire the principle my Lord founds his opinion upon, but must own I am of opinion with my brothers *Clive* and *Bathurst*; this statute was not calculated for demises by deed, but aimed at other demises; enjoyment was the matter in the contemplation of the makers of this statute; it meant that a landlord in cases of distress for rent where there has been an enjoyment shall not, in *replevin*, be obliged to set out his title in his pleadings, though they should go on as far as a surrebutter, *&c. &c.* pleadings from the beginning to the end in one cause must be upon one and the same thing, and if this plea was to be admitted good, it would overthrow the statute; perhaps there may be one case in 1000 where a tenant may have taken a farm upon a bad title; but in answer to *that*, he may recover his rent back again and damages; if a man sells, affirming he has a good title, if he has not, the buyer may recover his purchase money back again. It is objected by my Lord Chief Justice, why has not the statute taken away this plea in debt and covenant for rent; the answer is, they are grounded on deeds; but this statute relates to parol leases, or leases in writing not by deed. After time taken to consider, the Lord Chief Justice altered his opinion, and agreed with the other three Judges, *ut audiui*, that this plea of *nil habuit, &c.* in this case was bad; and *per totam curiam*, judgment was given for the defendant.

William

William Stevens of the demise of Mary Costard alias Bigg *versus* Sarah Winning widow, Sarah Costard widow, Henry Stevens, Esq; Timothy Pearse and Francis Steele. C. B.

EJECTMENT of lands in *Bradfield* in *Berkshire*; verdict for the plaintiff, subject to the opinion of the court upon the following case.

James Costard being seised in fee of the lands in question, by lease and release of the 4th and 5th of *April* 1721. in consideration of a marriage to be had between him and *Sarah*——— and of 300*l.* her portion, settled the same to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of the body of *S.* his wife by the said *James* to be begotten, remainder to the said *James* in fee: the marriage took effect, and they had issue *James* the son, and a daughter *Sarah*, now *Sarah Winning*, one of the defendants. *James Costard* the father by will of the 10th of *June* 1731. devised the premises to his son *James C.* after the death of *Sarah* his mother, and died in *April* 1739. *James C.* the son, 16th of *July* 1750. married *Sarah Higgs*, now *Sarah Costard*, another of the defendants.

Whether a tenant in tail having committed murder, can, between the time of the stroke and his conviction, bar the tail by a fine.

James Costard the son, on the 16th of *September* 1752. (his wife now living) married the lessor of the plaintiff *Mary Costard* alias *Bigg*, and hath issue by her a natural son about two years old.

That by lease and release of the 11th and 12th of *June* 1753. reciting that *James C.* the son had married *Mary Bigg* when he had another wife living, that the said *James* being conscious of the injury he had done to the said *Mary*, in consideration of the said injury, and of 100*l.* paid to him by *Edward Bigg* her father, he the said *James C.* the son conveyed the premises to the use of himself for life, remainder to the lessor of the plaintiff for life, remainder to the use of such child or children of the body of the lessor of the plaintiff begotten or to be begotten, by the said *James C.* remainder to himself in fee.

On the 23d of *April* *James Costard* the son murdered his mother who was tenant for life of the premises, and before he entred into the lands, *James C.* by deed of the 24th of *June* 1762. between himself of the first part, the lessor of the plaintiff of the second part, and *Ann Bigg* her mother, (administratrix of *Edward Bigg* her father) of the third part, reciting the said deed of the 11th and 12th of

of

of June 1753, it is witnessed, that for docking the estate-tail, and for making the said last deed good, he the said *James C.* covenanted to levy a fine of the premisses *sur conusance de droit come ceo, &c.* to the said *Ann Bigg* with proclamations, to the use of himself for life, remainder to the lessor of the plaintiff for life, remainder to *James Costard* the reputed son of the said *James C.* the conusor by the said *Mary Bigg* the lessor of the plaintiff, remainder to his own right heirs in fee. In *Trinity* term 1762. the fine was levied accordingly, and afterwards *James Costard* the conusor was convicted of the murder of his mother at *Oxford* assizes.

The defendant *Henry Stephens* is lord of the manor, *Sarah Costard* is the widow of the conusor, *Timothy Pearce* and *Francis Steele* are tenants in possession of the premisses, and *Sarah Whinning* is sister and heir of the conusor, and heir in tail under her father's marriage settlement in 1721. and has made an actual entry into the premisses; that the lessor of the plaintiff had no notice of the marriage of the said *James Costard* to the defendant *Sarah* previous to her own marriage with him.

The question was, whether a tenant in tail having committed murder, can afterwards, before conviction, levy a fine and bar the next heir in tail, his sister; and if he cannot, the judgment of the court must be with the defendants.

1. It was argued for the plaintiff, that the estate-tail was extinct by the fine, as much as if tenant in tail were dead without issue, because two fees expectant one upon another cannot subsist in the same person. 2. Because by the 32 H. 8. c. 36. the fine is declared to be a bar, and a discharge of the estate-tail. 3. Because the *stat. Westm. 2.* having made estates-tail a kind of particular estate, they are (the protection of the statute being gone by the fine) like all other particular estates, subject to merger and extinguishment when united with the absolute fee. *Symond v. Cudmore*, 1 Salk. 338. it was admitted that if tenant in tail makes a lease for years, and is attainted, the King shall avoid the lease where he is interested; but where the King is not interested, as here he is not, all the facts (as was said) done by a felon murderer, tenant in tail, between the stroke and the attainder, are valid to convey.

On the other side for the defendants it was objected, that the operation of the fine vested a fee in the conusor which instantly became forfeited. To this it was answered by *Gould* justice, that the deed to lead the uses of the fine is to be considered as part of the fine itself, and that in deeds of uses, the intention of the parties must always govern; that here the intention of the parties is clear, that
a fee

a fee should not vest in the conusor; and that such intention shall repel the presumption of law. The court inclined to give judgment for the plaintiff, but a second argument being desired, there was an *ulterius concilium*; but I never heard this case was argued again.

Hope *versus* Colman, Esq; C. B. Hilary 4 Geo. 3.
Rolls 401, 402.

ELLEN Hope brought a writ of annuity against *Philips Colman* and declared against him of a plea that he render to her 40*l.* which are in arrear to her of a certain annuity or yearly rent of 40*l.* and which the said *Philips* owes to her, and unjustly detains, &c. and whereupon the said *Ellen* by *M. B.* her attorney complains, that whereas the said *Philips* on the 6th of May 1748. at *Islington* in *Middlesex*, by his deed poll (which the said *Ellen* brings here into court sealed, &c.) for the better support, provision and maintenance of the said *Ellen*, then a faithful servant of him the said *Philips*, and for other good causes and considerations, &c. did for himself, his heirs, executors and administrators, grant to the said *Ellen* one annuity or yearly payment of forty pounds, clear of all taxes, charges and deductions whatsoever; to have, hold, perceive, take and enjoy the said annuity of 40*l.* to the said *Ellen* or her assigns, from the 29th day of September then next, during the term of her life, to be paid at the mansion-house of the said *Philips* in *Ipswich*, by quarterly payments, *viz* on the 25th of December, the 25th of March, the 24th of June, and the 29th of September, by equal portions; the first payment to be made on the 25th of December then next, and from thenceforth to continue and yearly to be paid to her during her life, upon the days and at the place aforesaid, as by the said deed poll (among other things) appear. By virtue whereof the said *Ellen*, then and there became, and was seised of the said annuity or yearly rent of 40*l.* in her demesne as of freehold, *viz*. for the term of her life; and the said *Ellen* in fact says, that 40*l.* of the said annuity or annual rent for one year ended on the 5th day of April 1763, according to the stile or computation of time now used in this realm, on that day became and were due and in arrear from the said *Philips* to the said *Ellen*, and still are unpaid and in arrear to her, whereby an action hath accrued to her to demand and have of the said *Philips* the said 40*l.* yet the said *Philips* (although often requested) hath not yet rendered or paid to the said *Ellen* the said 40*l.* of the yearly rent aforesaid, but hath with-held the same, and hath hitherto altogether refused, and still refuses to render or pay the same to the said *Ellen*, whereupon she says that she is injured, and hath suffered damage to the value of 20*l.* and therefore she brings suit, &c.

Debt for an annuity granted by defendant to plaintiff in consideration of faithful service for her life.

Plea.

Oyer of the deed.

Defendant covenants to pay the annuity (if the same be personally demanded by the plaintiff).

Proviso that if the grantee marry, the annuity shall cease, and the deed shall thereupon be void.

Protestando that defendant was always ready to pay the annuity.

For plea says, that the plaintiff did not personally demand the annuity at the defendant's house.

And the defendant by *L. K.* his attorney, comes and defends the wrong and injury, when, &c. and prays *oyer* of the said deed poll; and it is read to him in these words, (to wit) To all people to whom these presents shall come, *Philips Colman*, of, &c. Esq; sendeth greeting (so sets out the *grant*, *habendum*, and *times* and place of payment of the annuity as in the declaration; and then goes on and sets out the rest of the deed as follows) subject nevertheless to determination as herein after is mentioned; and the said *Philips Colman* for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said *Ellen Hope*, her executors, administrators and assigns, that he the said *Philips Colman*, his heirs, executors, administrators, or assigns, shall and will yearly and every year from the said 29th day of *September* next, during the natural life of the said *Ellen*, well and truly satisfy and pay, or cause to be satisfied and paid unto the said *Ellen Hope* or her assigns, the said annuity or yearly payment of forty pounds, without any deduction whatsoever, upon the days and at the place aforesaid (*If the same be personally demanded by the said Ellen Hope*) according to the purport, true intent and meaning of these presents; provided nevertheless, and it is the true intent and meaning of these presents, and of the parties hereunto, that if the said *Ellen Hope* shall and do intermarry with any person whomsoever in the life-time of the said *Philips Colman*, without his approbation and consent in writing first had and obtained, that then and immediately upon her intermarriage without such consent as aforesaid, the said annuity hereby given and granted shall absolutely cease and determine, and the said *Philips Colman*, his heirs, executors, administrators or assigns, shall be no longer subject or liable to the payment thereof, but this present deed, and every clause, matter and thing herein contained, shall from thenceforth be utterly void and of none effect; (any thing herein contained to the contrary notwithstanding); in witness whereof the said *Philips Colman* hath hereunto set his hand and seal the 6th day of *May* in the year of our Lord 1748. which being read and heard, the said *Philips* says that the said *Ellen* ought not to have or maintain her said action against him, because protesting that he the said *Philips* on the said 5th day of *April* in the year of our Lord 1763. aforesaid, and continually from thenceforth hitherto was ready and willing to have paid to the said *Ellen* the said annuity of 40*l.* above demanded, if the same had been personally demanded by the said *Ellen*, according to the true intent and meaning of the said deed poll, for plea in this behalf the said *Philips* says, that the said *Ellen* did not on the said 5th day of *April* in the said year 1763. or on any other of the days herein beforementioned, whereon the same annuity, or any part thereof, is made payable as aforesaid, personally demand, nor hath at any time since all or any of the said several and respective days personally demanded the said annuity of 40*l.* above supposed to be due, in arrear and unpaid to her as aforesaid,

or any part thereof, at the said mansion-house of him the said *Philips*, situate in *Ipswich* aforesaid, according to the true intent and meaning of the said deed poll, that is to say, at *Islington* aforesaid in the said county of *Middlesex*; and this he is ready to verify; wherefore he prays judgment if the said *Ellen* ought to have or maintain her said action thereof against him, &c. And the said *Philips* for further plea by leave of the court, &c. says that the said *Ellen* ought not to have or maintain her said action against him, because protesting that the said *Philips* on the said 5th day of *April* 1763. and continually from thenceforth hitherto, was ready and willing to have paid to the said *Ellen* the said annuity of 40 l. above demanded, if the same had been personally demanded by the said *Ellen*, according to the true intent and meaning of the said deed poll, for plea in this behalf the said *Philips* says, that the said *Ellen* did not on the said 5th day of *April* 1763. or on any other of the days herein before mentioned, whereon the said annuity, or any part thereof, is made payable as aforesaid, personally demand, nor hath at any time since all or any of the said several and respective days personally demanded the said annuity of forty pounds, above supposed to be due, in arrear and unpaid to her as aforesaid, or any part thereof, according to the true intent and meaning of the said deed poll, that is to say, at *Islington* aforesaid in the said county of *Middlesex*; and this he ready to verify, wherefore he prays judgment if the said *Ellen* ought to have or maintain her said action thereof against him, &c.

Second Plea.
that the plaintiff did not demand the annuity personally of the defendant.

The plaintiff demurred generally to each of the defendant's pleas, and he joined in demurrer.

Upon the argument of this case it was objected for the plaintiff, that the demand of the annuity is not traversable, in this action, that the plaintiff has in her declaration set out the grant of the annuity, and how and when it is payable, and that the same is in arrear; that this is substantive matter, and sufficient to shew the plaintiff's right to this action; that the covenant to pay the annuity, (if the same be personally demanded by the plaintiff) which is in a parenthesis, is distinct from, and independent upon the grant, and extends no farther than the covenant itself; but perhaps, if an action of covenant had been brought, it might have been necessary for the plaintiff to have made a personal demand in that case; the grant is clear and certain, and there are no words in it that want any explanation by the words of the covenant.

1. For the defendant it was said that the whole deed now was before the court, and ought to be taken together, and the personal demand to be coupled with the grant. 2. That in the declaration it is laid, that by virtue of the grant, the plaintiff became and was

seised

seised of the annuity *in her demesne* as of freehold, which is ill, this being a grant of a mere personal thing, and not a rent issuing out of land.

Per totam curiam, 1. The grant is substantive, and so is the covenant substantive, and the demand in this action is not traversable, whatever it might have been if an action had been brought upon the covenant; but we think it would not be traversable in that case, as it is contained in a parenthesis in the deed. 2. As to the manner of pleading in the declaration, that the plaintiff was seised of the annuity *in her demesne*, &c. that is mere matter of form, and this being upon a general demurrer, it is helped by the *stat. 4 & 5. of Queen Anne*.

There was an insinuation thrown out by the defendant's counsel that this deed was made and obtained upon an immoral consideration, but the court said no such matter appeared to them; and gave judgment for the plaintiff.

Reeks *versus* Groneman. C. B.

What is a proper affidavit to hold to bail, and what is not such.

THE affidavit to hold to bail was made by the plaintiff in these words, (*viz.*) *Thomas Reeks* (of such a place) merchant, make oath that *Jodocus Groneman* of the same place musician, in justly indebted to this deponent in the sum of twelve pounds sixteen shillings and eight pence for meat, drink and lodging, and other necessities found and provided by this deponent for the said *Jodocus Groneman*.

I objected that this was no oath of the debt, it being said that the defendant *in* justly indebted, instead of *is* justly indebted; upon shewing cause for the plaintiff why a common appearance should not be entered; serjeant *Burland* said, that it was a mere slip of the clerk in a single letter, and offered a supplemental affidavit to the court to make it good.

For the defendant it was insisted it ought not now to be received, for if the first was no affidavit, the arrest was illegal by the *stat. 12 Geo. 1.* for preventing frivolous and vexatious arrests, and that this was no affidavit, as no perjury could be assigned upon it; and if the arrest was illegal, no subsequent act could make it legal.

Lord Chief Justice *Pratt*, and *Bathurst* Justice, at first, were inclined to receive the supplemental affidavit to make the arrest good; but

but *Clive* and *Gould* justices, were clearly of a contrary opinion; and said, as the first was no oath at all, it could not be made good by any supplemental affidavit. The court being divided, the rule was enlarged till a future day, when the matter was stirred again. And serjeant *Burland* cited several cases to shew that supplemental affidavits had frequently been received in like cases in this court, both in the treasury, and at the Judges chambers; that where executors or administrators had made affidavit of a debt due to their testator or intestate (as it appeared by the books, &c. without saying *as the affidavit-man verily believed*, (which is always necessary) those words, *as he verily believed*, had often been supplied with leave of the court after the arrest.

In answer to which I took this difference, that in the cases cited, there was some positive oath upon which a perjury might be assigned, *viz. as appeared by the books, &c.* but in the present case there is no oath at all. 2dly, That the court of King's Bench never did admit any supplemental affidavit whatever, nor would ever go out of the first affidavit to hold to bail since the *stat. 12 Geo. 1.* and have always held, if *that* be insufficient, it can never be made good by any affidavit after the arrest. 2 *Stra.* 1157. *Heathcote v. Gofin* is directly in point. Also the case of *Hussy v. Baskerville* in *B. R.* about seven years ago, Mr. *Nares* there moved that the defendant might be discharged upon common bail, there being no affidavit to hold to bail filed with the proper officer when the writ was sued out. Mr. *Gould* for the plaintiff shewed cause, and produced an affidavit of the debt proved to be actually made and sworn before the writ was sued out; but the clerk, when he took out the writ, had forgotten to file it *then*; and the court discharged the defendant from the arrest on filing common bail, because the affidavit of the debt ought to have been filed with the proper officer before, or at the same time the writ was sued out; also the case of *Nichols v. Dallybunt*, 1 *Barnes* 77. One convicted of felony made affidavit of the debt to hold to bail; this court held it was not to be received, and was as if no affidavit, and refused to receive a supplemental one.

It was also insisted that trespass and false imprisonment would lay in this case for the defendant against the plaintiff and the filazer, or either of them, though it would not lie against the sheriff, who might justify under the writ which was indorsed to hold to bail by the filazer, and that any affidavit of the debt now to be made could not in point of law make the arrest lawful, as to the plaintiff or the filazer.

Lord Chief Justice *Pratt*: I own, that upon the first debate of this matter, I was inclined to receive a supplemental affidavit to make this good, which is nothing more than a mere slip of the pen in a single letter; when I consider it again upon what has been further said, it appears to be a matter of great consequence in a point of liberty upon a statute made in favour of the liberty of the subject, which in effect says, that no man for the future shall be arrested before such affidavit of the debt be made and filed with the proper officer; now it is certain this is no affidavit, because a perjury cannot be assigned upon it, therefore this is an arrest contrary to law; and shall this court (or can it) make *that* lawful, which the law says is unlawful; I do not find this court has ever gone so far as to admit a supplemental affidavit, where the first amounted to no oath at all, but has only supplied small defects in affidavits which have not been quite full enough; as in the cases cited of executors and administrators, and which the King's Bench has never come into; and therefore I have changed my opinion, and agree with my brothers *Clive* and *Gould*, that the rule must be absolute for a common appearance. *Clive* and *Gould* justices were still of the same opinion as at first, and thought that an action for false imprisonment would lie against the plaintiff or the filazer; but *Bathurst* Justice was of opinion it would not lie; as to the matter of a common appearance he seemed to agree with the rest of the court; and the rule was made absolute for a common appearance.

Easter

Easter Term

4 Geo. 3. 1764.

Swithin and his wife *versus* Vincent and his wife.
Swithin and his wife *versus* Vincent only. C. B.

TWO actions for words, and two declarations, each containing six counts; in the first cause the words were laid to be spoken by the wife of *Vincent*, in the latter, by *Vincent* himself. It was moved for the defendants, that these two actions might be reduced or consolidated into one; because (as was said) both required the same pleas; that the husband and wife were one person in law in civil suits, and the husband was liable to pay all the damages, both for his own and his wife's slander, and it would save expence to the parties. But *per curiam*, This cannot be done, for it would be error to join the wife in a declaration for words spoken by the husband *only*; and the declaration would be ill, either upon a demurrer, or in arrest of judgment; so the motion was refused.

Two actions by a man and his wife, one against a man and his wife, *per se* and the other against the *man* ~~wife~~ only, cannot be consolidated.

Brett at the suit of Wadham. C. B.

A Motion was made for an attachment for non-payment of 8l. 8s. costs, according to a rule upon the plaintiff for that purpose and the prothonotary's *allocatur*; upon an affidavit that *on or about* the 9th day of *February* last he served the rule with the *allocatur*, and demanded the costs of the plaintiff, who refused to pay the same. *Per curiam*, The affidavit is insufficient, for the words *on or about* leave the day of the service and demand uncertain; and it might be upon a *Sunday* for any thing that appears to the contrary, which is *dies non juridicus*; so you must mend the affidavit, for there is no rule to shew cause in this case, but an attachment goes at once if the affidavit be sufficient.

Affidavit of service of a rule with an *allocatur* of costs and a demand thereof, on or about such a day, is insufficient.

Goldsmith *versus* Baynard, C. B.

Assumpfit.

ACTION upon the case upon several promises, to the plaintiff's damage of forty pounds.

Plea of privilege for a 60th clerk in Chancery.

And the defendant by *E. D.* his attorney comes and defends the wrong and injury, &c. and says, that this court here ought not to take, nor will take cognisance of the said plea, because he says that he the defendant, long before the suing forth of the original writ of the plaintiff, and at the time of suing forth the same was, and from thence hitherto hath been, and still is, one of the clerks of *Christian Zincke*, Esq; one of the six clerks of the high court of Chancery of our Lord the King (the said court then being, and still held at *Westminster* in the county of *Middlesex*), and that he doth serve and intends to serve our Lord the King and his people as such clerk of the said *Christian Zincke*, one of the six clerks of the high court of Chancery of our said Lord the now King, to wit, in the said high court of Chancery; and the said defendant further says, that as well for the royal dignity of our Lord the now King and his progenitors, heretofore Kings of *England*, from an antient custom in the said high court of Chancery of our said Lord the now King and his progenitors aforesaid, time out of mind obtained, and hitherto allowed and approved of, the Chancellor of *England*, or Keeper of the great seal of *England* for the time being, and other officers, clerks and ministers of the same court of Chancery in their own persons, and in their men servants, lands, tenements, estates, goods and chattels, ought to be free and quieted, as antiently they used to be; and the defendant as such clerk of the said *Christian Zincke* now ought to be free and quieted, according to the privilege and liberties of the said court of Chancery time immemorially used, and ought not by any means to be arrested, impleaded or imprisoned, or drawn or compelled to appear or answer before any of our Lord the King's justices, officers or secular ministers whomsoever, except before the Chancellor of *England*, or keeper of the great seal of *England* for the time being, upon any pleas, complaints, trespasses or demands whatsoever which do not touch the King's person, (pleas of freehold, felonies and appeals only excepted) elsewhere than in the said high court of Chancery, whereby they might be withdrawn from the said high court of Chancery of our said Lord the King against their will, contrary to what they formerly used to be; and this the defendant is ready to verify; wherefore he prays judgment if he ought to be compelled to answer to the plaintiff in the said plea here in court, &c.

J. Burland.

And

And the plaintiff says, that for any thing by the defendant above in pleading alledged this court here may and ought to take cognizance of the said plea against the defendant, because protesting that the said plea of the defendant by him above pleaded, and the matter therein contained, are insufficient in law, and that the plaintiff has no occasion, nor is bound by the law of the land to make any answer thereto; for replication in this behalf the plaintiff says, that the defendant having been a prisoner for debt in actual custody of the gaol or prison of the King's Bench on the 25th day of October in the year of our Lord 1760. and so continuing and being long before the suing out of the said original writ of the plaintiff against him, to wit, on the 15th day of July in the year of our Lord 1761. in conformity to a certain act of parliament, made in the parliament of our Sovereign Lord the present King, at a sessions thereof, holden at *Westminster* in the county of *Middlesex*, in the first year of his reign, intituled, An act for the relief of insolvent debtors at the general quarter-sessions of the peace, holden at *Guildford* in the county of *Surry* in and for the same county, before Sir *Anthony Thomas Bdey*, Baronet, *George Onslow*, and *John Evelyn* Esquires, and others their fellows, then justices of our said Lord the present King, assigned to keep the peace, and to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, made and delivered into the said court of general quarter-sessions, so held as aforesaid, a certain schedule subscribed by the said defendant of all the estate and effects whatsoever of him the said defendant, excepting his wearing apparel, bedding for himself and family, working tools and implements for his occupation and calling, and those in the whole not exceeding the value of ten pounds; and amongst other the estate and effects of the said defendant, a certain seat or office of the defendant in a certain office belonging to the high court of Chancery, called the six clerks office, to which seat or office the defendant was then intituled as one of the clerks of the said *Christian Zincke* in the said plea named, so being one of the six clerks of the high court of Chancery; and the defendant afterwards, on the same day at the said general quarter-sessions of the peace so held as aforesaid, was duly discharged by virtue of the said act of parliament as an insolvent debtor, and then and there had and took the benefit of the said act, by reason of which premisses, and by virtue of the said act, the said seat or office of the defendant, and all his right, title, interest and benefit of, in and to the same, and all the said other estate and effects of the defendant, (except as aforesaid) contained and specified in the said schedule, then and there became and were vested in *John Lawson*, Esq; then clerk of the peace of the said county of *Surry*, for the ends and purposes in the same act of parliament in that behalf mentioned; and the plaintiff further says, that the defendant hath not at any time since been restored to the possession and enjoyment of

Replication.
the defendant
was discharged
out of prison
on the insol-
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act, and af-
signed his of-
fice to the
clerk of the
peace.

PART II.

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his said seat or office, nor hath acted or practised as one of the clerks of the said *Christian Zincke* as aforesaid, at any time since the making and delivery of the schedule aforesaid, and the taking of the benefit of the said act of parliament by the defendant as aforesaid; by reason of which premises the defendant at the time of suing forth of the said original writ of the plaintiff was not, nor hath any time since been intitled to the said pretended privilege; and this the plaintiff is ready to verify; wherefore he prays judgment, and that the court here will take cognizance of the said plea, and that the defendant may be compelled to answer further to the plaintiff in the said plea, &c.

Ja. Hewitt.

The defendant has demurred generally, and the plaintiff has joined in demurrer.

This case was argued twice at the bar; two questions were made, 1st, whether this office of a 60th clerk is assignable pursuant to the insolvent debtors act of the first year of the King. 2d, Whether the defendant can be intitled to privilege, it appearing by the replication, that he has not acted or practised since his discharge and taking the benefit of the act.

1. For the defendant it was said, that a 60th clerk in Chancery is certainly intitled to be sued in the petit bag office, and that his office is not assignable by law, and therefore the defendant still remains a 60th clerk. That it is a mere personal office of trust under the 6th clerk, and before any one is admitted to it he must serve a clerkship, and undergo an examination by the Master of the Rolls, and that it could not vest in the clerk of the peace by the assignment of his effects under the statute; that the 6th clerk is not obliged to admit the assignee; that it cannot be taken in execution. *Vaugh.* 181. it would not go to assignees under a commission of bankrupts, nor would copyholds if they had not been mentioned in the *stat.* 13 *Eliz.* This office is a freehold, if the clerk of the peace dies, who must it go to? what must become of the business of his office, if the assignee be an unfit person? and a woman may be an assignee under this statute. The office of clerk to the dyers company was determined in this court not to be assignable in the schedule. In the case of *North* against *Calf*, *B. R.* about 14 or 15 years ago the court determined that the office of Provost Marshall-man was not assignable, and he must have leave to resign. In *Bacon's Abr. tit. Offices*, there is a *quære* whether a 60th clerk can sell his office or not; *Verney*, Master of the Rolls, thought he could not; they have indeed sometimes been permitted to sell, but that has always been to persons who have served regular clerkships in the office, and have been properly qualified; the assignment of the office of a Filacer would be void; this is an office of

trust

trust and confidence under the 6th clerk, and cannot be assigned for years, because then it might go to executors and administrators, never trusted or confided in. *Vaugh.* 181.

2. As to the second question; the plaintiff has only alledged that the defendant has not practised since his discharge, they have not denied that he is still a clerk, and consequently intitled to privilege; the plaintiff ought to have traversed *absque hoc*, that the defendant before the suing out the original writ was, and still is one of the clerks of *Christian Zincke*, one of the six clerks of the court of Chancery; for though he has not exercised his office since the time of his discharge, that may have been by reason of sickness, or for want of business in the office, for any thing that appears on this record, and therefore he is still intitled to his privilege.

1. For the plaintiff it was objected that the defendant's plea is bad, because it alledges only that he is clerk to *Christian Zincke*, and that he serves and intends to serve as such clerk; but it does not alledge that he is *attendant* upon that office and duty; so is *Bro. Traverse*, pl. 27. *Bro. Privilege* 40. and that is the material fact to be traversed.

2. It was objected that the plea is bad in another respect, for that it alledges a custom for the Chancellor to be sued before himself which is void, because he cannot be sued before himself. 3 *Keb.* 352. *Fawcner v. Annis*; for these two reasons a *respondeas ouster* was prayed.

Curia: This sort of plea is to be discouraged; we see the defendant is not in actual *service and attendant* upon the court of Chancery; the replication alledges that the defendant put this office in his schedule, and has assigned it; this is confessed by the demurrer and therefore the defendant is concluded to say he has not assigned it; this plea is a mere dilatory, and we look nicely into such pleas; the defendant ought to have alledged that he is *actually attendant* on the office, for *attendance* is the ground and foundation of the privilege *that they may not be drawn into other courts*. The defendant has said in his plea that he serves and intends to serve the King and his people as clerk to Mr. *Zincke*, but a man may be said to serve and be a servant, and yet not be attendant.

Another objection is to the custom; it is bad to say that the Chancellor himself is to be impleaded before himself; it is idle, and contrary to the fundamental laws of all nations upon earth, for a man to be judge and party in his own cause; Lord *Hobart* says, an act of parliament could not make such a law.

Serjeant

Serjeant *Mead* pleaded his privilege in the court of King's Bench, that he ought to be sued in this court, after he had long retired from this bar; and for the reason that he was not attendant here, his privilege was disallowed. Some of the court doubted whether this office was assignable or not, and thought it could only be surrendered to the Master of the Rolls, who is bound to receive such surrender; they gave no absolute opinion, whether the replication was good or bad; but the whole court were of opinion that the plea was bad for the reasons above, and gave judgment that the defendant should answer over.

N. In *Hilary* term 30 G. 2. B. R. one *Maynard* an attorney was arrested on a *latitat* for 270 *l.* and gave a bail-bond; he moved to have the bail-bond given up, and that proceedings should stay, for that he was an attorney, and ought to have the privilege of being sued as an attorney by bill, and ought not to have been arrested: upon shewing cause it appeared that he had left off practice, and was called *Esq;* so the court refused the motion, and disallowed his privilege; cited *per Gould Justice*.

Respondeat Ouster.

Heatherley on the demise of Worthington and Tunna-
dine *versus* Weston and others, C. B.

1 Add MS 750

Tenants in
common can-
not make a
joint lease.

EJECTMENT of lands in the county of *Warwick*; verdict for the plaintiff, subject to the opinion of the court upon a very special case of a title which was twice argued at the bar, wherein several points were debated, but at last were narrowed and reduced to the single question, whether tenants in common can make a joint demise? the lease in the declaration being laid to be of the joint demise of the plaintiff's lessors who appear to be tenants in common upon the state of the case; and after time taken to consider, *The whole court* were of opinion, that tenants in common cannot join in making a lease, for their estates are several and distinct, and there is no privity between them, and for that reason, one tenant in common may enfeoff another. *Bro. Feoffmt. de Terre, pl. 45.* in the case of *Hinxam on the demise of Fagg & al. v. Moon*, B. R. 15 Geo. 2. this point was determined; and see *Shew. 242. Cro. Jac. 83, 166. Comb. 2, 190. 1 Brownl. 39, 134. Co. Litt. 200.* Judgment for the defendants, and the *posse* delivered to them.

James

James Wallwyn, Esq; *versus* Richard Bishop of Landaff, Wallwyn Cecil clerk, and John Davis clerk.

QUARE *impedit* of the vicarage of the church of *Skenfretb* in the county of *Monmouth*; the plaintiff in his count makes title, that *Philip Cecil* being seised of the advowson of the vicarage in gross as of fee and right, on the 24th of *December* 1706. by indenture between the said *Philip Cecil* and *Walter Cecil* of the first part, *John Trist*, Esq; and *Thomas Evans*, Esq; of the second part, *John Kyrle*, Esq; and the said *James Wallwyn* (the plaintiff), of the third part *William Powell*, Esq; *William Bennet* and *Walter Roberts* of the fourth part, and *Elizabeth Wallwyn* spinster, of the fifth part; in consideration of a marriage to be had between the said *Philips Cecil* and *Elizabeth Wallwyn*, did grant the avowson (among other things) to *Trist* and *Evans* their heirs and assigns, to the use of *Philip Cecil*, *Walter Cecil* and *William Powell*, their respective heirs, executors and administrators, until the marriage, and after, to the use of *Philip Cecil* for the term of 99 years, if he should so long live; then to the use of the said three trustees to preserve contingent remainders, and after his decease, then to the use of the said *John Kyrle* and *James Wallwyn* for the term of 500 years, then to the use of the first and every other son of the body of *Philip Cecil* upon the body of *Elizabeth Wallwyn* to be begotten, and the heirs male of the body of such first and every other son; and in default of such issue, in case the said *Elizabeth* should happen to be *ensient* with child of the said *Philip Cecil* at the time of his death, then to the use of the said *Elizabeth* until she should be delivered or should die, whichsoever should first happen, in trust for such child or children, when it would be born; and if a son or sons, then from and after the birth of such son or sons, to the use and behoof of such afterborn son or sons, and the heirs male of his and their bodies, one after the other, as they should be in priority of birth, and the respective heirs male of the body and bodies of such after-born son and sons, and for want of such issue, to the use of all and every the daughters of the said *Philip* and *Elizabeth* in special tail; and for want of such issue, to the use of the said *Philip Cecil*, his heirs and assigns for ever; that on the said 24th of *December* 1706. the said marriage took effect, whereby and by force of the statute for transferring uses into possession *Philip Cecil* became possessed of the advowson for the term of 99 years determinable as above, (the remainder thereof belonging as above); and *Philip Cecil* being so possessed of the advowson, and the church being then full of one *James Philips*, the said *Philips Cecil* afterwards, on the first day of *June* 1724, by deed granted the then next presentation to *John Stephens*, in case the church should become vacant, during the said

Quare impedit.
Declaration of Michaelmas term 1 Geo. 3. Rolls 701, &c.

A marriage settlement made by Philip Cecil the 24th of Decem. 1706.

Under which he was tenant for 99 years, if he should so long live. And the church being full of James Philips on the 1st of June 1724. he granted the next turn to John Stephens.

PART II.

O o o

term

The church became void by the death of J. Philips, and J. Stephens presented W. Stephens.

That Phil. Cecil died possessed, and John Kyrle also died 1 Oct. 1731. whereupon plaintiff became solely possessed of the advowson for the term of 500 years, and the church being void by the death of W. Stephens, he presented R. Reece sen. who resigned, and then he presented R. Reece jun. who has resigned, whereupon it belonged to him the plaintiff to present, and one R. Wheeler by usurpation presented W. Cecil the defendant, who has resigned, and the church is now vacant, and it belongs to plaintiff to present, and defendants hinder him.

Imparlances. The bishop claims but as ordinary.

term of 99 years; by virtue whereof *John Stephens* was possessed of the advowson for the next presentation to the church in case it should become vacant during the said term of 99 years; and being so possessed, the church during that term became vacant by the death of *James Philips*, which was the next avoidance after the said grant to the said *John Stephens*; whereupon *John Stephens* presented to the vicarage of the said church, being vacant, *William Stephens* his clerk, who was thereupon admitted, instituted and inducted, &c. and the said *Philip Cecil* being so possessed of the advowson for the remainder of the term of 99 years, determinable as aforesaid, (remainders as above) and the church being full of *William Stephens*, *Philip Cecil* afterwards on the first day of *October* 1731. died so possessed, and the said *John Kyrle* then also died, whereupon by survivorship the said *James Wallwyn* became possessed of the advowson for the remainder of the said term of 500 years then to come, and being so possessed thereof the church became vacant by the death of *William Stephens*, whereupon *James Wallwyn* presented *Richard Reece* the elder his clerk, who was thereupon admitted, instituted and inducted in time of peace, &c. and the said *James Wallwyn* being so possessed of the advowson the church became vacant by the resignation of *Richard Reece* the elder, whereupon the said *James Wallwyn* presented *Richard Reece* the younger his clerk, who was thereupon admitted, instituted and inducted in time of peace, &c. and the said *James Wallwyn* being so possessed of the advowson, the church became vacant by the resignation of *Richard Reece* the younger; whereupon it belonged to the said *James Wallwyn*, to present a fit person to the vicarage of the church so vacant, and one *Robert Wheeler* clerk, usurping upon the said *James Wallwyn*, presented to the vicarage of the church so vacant *Wallwyn Cecil* the now defendant his clerk, who upon that presentation was admitted, instituted and inducted into the same; and the said *James Wallwyn* being so possessed of the advowson, the church became vacant by the resignation of the said *Wallwyn Cecil*, and yet is vacant, by reason thereof it belonged, and still belongs to the said *James Wallwyn* to present a fit person to the vicarage of the said church so being vacant; and the said *Richard Bishop* of *Landaff*, *Wallwyn Cecil* and *John Davis* unjustly hinder him from presenting a fit person to the vicarage of the said church; whereupon the said *James Wallwyn* says he is injured, and hath sustained damage to the value of 300*l.* and therefore he brings suit, &c.

All the defendants imparl from *Michaelmas* term 1760. till *Hilary* 1761. from *Hilary* till *Easter* 1761. and from *Easter* to *Trinity* term 1761. 1 *Geo.* 3. then the bishop comes and pleads that he claims nothing but as ordinary, to which the plaintiff replies in the common form, and prays a writ to the bishop, which is granted by the court with stay of execution thereof till the plea

between

between the plaintiff and the other two defendants be determined, &c.

The defendants *Cecil* and *Davis* further imparl till *Michaelmas* 1761. from *Michaelmas* till *Hilary* 1762. from *Hilary* till *Easter* 1762. and from *Easter* till *Trinity* term 1762. 2 Geo. 3. and then the defendant *Wallwyn Cecil* comes and says that the plaintiff ought not to have his action against him because he says, that *Philip Cecil* the elder, father of the said *Philip Cecil* in the declaration named, long before the making the indenture of marriage settlement, while the church was full of a clerk *James Philips*, the then incumbent, to wit, on the 5th of *January* in the 10th year of King *William* the 3d, *William Powell* and *Walter Cecil*, Esq; prosecuted out of the same King's court of Chancery a writ of entry *sur disseisin in le post* against *Henry Probart*, Esq; and *Robert Price*, Esq; (amongst other things) of the said advowson of the vicarage of the said church, returnable from the day of *St. Hilary* in fifteen days (which is set forth at length in the plea) whereupon a common recovery was suffered the first day of the same *Hilary* term with triple voucher, when all the parties appeared in person at the bar, and wherein the said *Philip Cecil* the elder was first vouchee, who further vouched *Philip Cecil* his son, who vouched over the common vouchee, and judgment was thereupon given, and a writ of *seisin* awarded and executed the sixth day of *February* the 10th year of King *William* 3, (which recovery is set forth at length) as by the record thereof in the court of the Bench appears; which recovery was so had and suffered as to the said advowson, to the use of the said *William Powell* and *Walter Cecil*, their executors, administrators and assigns, from thenceforth for the term of 1000 years, and after the end or sooner determination of that term of 1000 years, to the use of the said *Philip Cecil* the younger in tail male; and for want of such issue, to the use of the said *Philip Cecil* the elder in fee; by virtue of which recovery, and by force of the statute of uses, the said *William Powell* and *Walter Cecil* afterwards, and long before the making the said indenture *quincupartite* in the declaration, became and were possessed of the avowson as in gross by itself for the said term of 1000 years, which term, at the time of the making of the said indenture *quincupartite*, was and still is subsisting and unexpired, and by reason whereof, nothing of or in the said advowson ever passed by the said indenture *quincupartite* into the possession of the said *John Kyrle* and *James Wallwyn*; and this the said *Wallwyn Cecil* is ready to verify; wherefore he prays judgment if the said *James Wallwyn* ought to have his action against him, &c.

Imparlan-
ces by the patron
and incum-
bent defen-
dants.

The patron of
the incum-
bent's plea.
That P. Cecil
sen. father of
P. Cecil, in
the declara-
tion before
the settlement
while the
church was
full of James
Phillips, 10
W. 3. suffer-
ed a common
recovery of
this advowson
(int' al')
wherein he
and his son
were severally
vouched,
which was
executed;
to the use of
Wm. Powell
and Walter
Cecil for the
term of 1000
years, which
is prior to the
plaintiff's title
in the declara-
tion, and is
still subsisting,
and that no-
thing passed to
the possession
of Kyrle and
the plaintiff by
the settlement

And

The other defendant
Davis's plea
that he is the
parson imparsoned, derives
a title down
to his patron
prior to plaintiff's title thus:
That P. Cecil
sen. being
seised in fee
presented Ja.
Phillips to the
church, being
vacant temp.
Car. 2. That
before the settlement 18
Jan. 1698.
P. Cecil sen.
and his
wife granted
and Phillip
Cecil the son
confirmed the
advowson
(among other
things) to
Henry Probart
and Ro. Price,
to the use of
Phil Cecil
jun. for his
life, and after
his death to
the use of the
heirs male of
his body.

and for want
of such issue,
to the use of
P. Cecil sen.
in fee,
whereby P.
Cecil jun. was
seised in tail;

And the said *John Davis* says that he is parson of the said church imparsoned in the same on the presentation of the said *Walkwyn Cecil* and that the said *James Walkwyn* ought not to have his action against him, because he says that long before the said indenture *quinquepartite* in the declaration mentioned, and before the said *Philip Cecil* in the said declaration named had any seisin of the said avowson, one *Philip Cecil* the elder, father of the said *Philip Cecil* abovenamed, was seised of the said avowson of the vicarage of the said church as in gross by itself as of fee and right; and being so seised thereof presented to the same, being vacant, *James Phillips* his clerk, who on that presentation was admitted, instituted and inducted into the same church in the time of peace in time of the Lord *Charles* the 2d, late King of *England*; and that afterwards and before the making of the said indenture *quinquepartite* in the above declaration mentioned, to wit, on the 18th day of *January* in the year of our Lord 1698. at the parish aforesaid, by a certain indenture of bargain and sale then and there made between the said *Philip Cecil* the elder and *Anne* his wife, and the said *Philip Cecil* the son, in the said declaration mentioned on the first part, one *Henry Probart* and *Robert Price* of the second part, and *William Powell* and *Walter Cecil* of the third part, (which is brought into court) in consideration of certain sums of money to the said *Philip Cecil* the elder and *Philip Cecil* the son paid, he the said *Philip Cecil* the elder, being so seised of the said avowson as aforesaid, granted, bargained, sold and released, and the said *Philip Cecil* the son in the said declaration mentioned confirmed to the said *Henry Probart* and *Robert Price*, (in their actual possession then being by virtue of a bargain and sale to them thereof made for the term of one whole year, by indenture bearing date the day next before the day of the date of the said indenture, now brought here into court, and made between the same parties last mentioned) and their heirs and assigns (amongst other things) the advowson, donation, free disposition and right of patronage of, in and to the said vicarage of the parish church of *Skenfretb* aforesaid, with all its rights, members and appurtenances; to have and to hold the said avowson with the appurtenances, (amongst other things) to the said *Henry Probart* and *Robert Price*, their heirs and assigns for ever, to the use and behoof of the said *Philip Cecil* the son for and during the term of his natural life, and from and after his decease, to the use of the heirs male of his body lawfully begotten, and for want of such issue then to the use and behoof of the right heirs of the said *Phillip Cecil* the elder for ever; by virtue whereof, and by force of the statute of uses, the said *Philip Cecil* the younger became and was seised of the said avowson as in gross by itself as of fee-tail and right, that is to say, to him and the heirs of his body issuing; and the said *John Davis* further saith, that the said *Philip Cecil* the younger being

being so seised of the said advowson, and the church being full of the said *James Philips* clerk, he the said *Philip Cecil* the son, by a certain writing under his hand and seal granted unto the said *John Stephens* in the declaration mentioned, the then first and next presentation to the church whensoever the same should then first and next become vacant (if the same should happen to become vacant in the life-time of the said *Philip Cecil* the son), by virtue of which grant the said *John Stephens* became and was possessed of the advowson for the then first and next vacancy thereof, in case the same happened to become vacant in the life-time of the said *Philip Cecil* the son; and the said *John Stephens* being so possessed thereof, the church became vacant in the life-time of *Philip Cecil* the son by the death of the said *James Philips*, which vacancy of the church was the first and next vacancy thereof after the grant aforesaid to the said *John Stephens* by *Philip Cecil* the son made as aforesaid; whereupon the said *John Stephens*, by virtue of the said grant presented to the church so vacant the said *William Stephens*, in the said declaration named his clerk, who thereupon was admitted, instituted and inducted in the time of peace, &c. and afterwards at *Skenfretb Philip Cecil* the son died so seised of the said advowson as in gross by itself, leaving issue male of his body issuing the said *Wallwyn Cecil*, one of the defendants, whereby the said *Wallwyn Cecil* became and was seised of the advowson of the vicarage of the church aforesaid as in gross by itself as of fee-tail and right, (that is to say) to him and the heirs male of his body issuing and being so seised thereof, the church became vacant by the death of the said *William Stephens*; and the said *James Wallwyn* having no right to present to the said church, but usurping upon the said *Wallwyn Cecil*, to whom of right it did belong to have presented a fit person to the church, presented the said *Richard Reece* the elder, in the declaration mentioned, his clerk, who was thereupon admitted, instituted and inducted in the time of peace, &c. and the church afterwards became vacant by the resignation of the said *Richard Reece* the elder; and the said *James Wallwyn* having no right to present to the church, but usurping again upon the said *Wallwyn Cecil*, to whom of right it did then belong to have presented a fit person to the church, presented to the church then vacant *Richard Reece* the younger, in the declaration mentioned, his clerk, who was thereupon admitted, instituted and inducted in the time of peace, &c. and the said *John Davis* further says, that the said *Wallwyn Cecil* being so seised of the advowson, and the church being full of the said *Richard Reece* the younger, he the said *Wallwyn Cecil*, by writing under his hand and seal, granted to the said *Robert Wheeler* in the declaration mentioned, the then first and next presentation of the church whensoever the same should then first happen to become vacant in the life-time of the said *Wallwyn Cecil*; by virtue of

and the church being full of *Ja. Philips*, *P. Cecil jun.* granted the next turn to *J. Stephens*.

That the church became void by the death of *James Philips* in the life-time of *P. Cecil jun.* and *Jo Stephens* presented *Wm. Stephens*. Afterwards *P. Cecil jun.* died, and the defendant *Wallwyn Cecil* is his heir male, and is seised of the advowson in tail.

That the church became void by the death of *W. Stephens*, and the plaintiff by usurpation presented *R. Reece sen.* who resigned, and the plaintiff again by usurpation presented *R. Reece jun.*

That the church being full of *R. Reece jun.* *Wallwyn Cecil* granted to *Rob. Wheeler* the next turn.

PART II.

P P P

which

That the church became void by resignation of R. Reece jun. and Robert Wheeler presented Wallwyn Cecil the defendant, who resigned, and he being seised of the advowson in tail male, and the church being void by his resignation, he presented this incumbent Davis the other defendant,

and then traverses the seisin in fee of Philip Cecil the son, in the declaration.

which grant the said *Robert Wheeler* became and was possessed of the advowson of the church for the then first and next vacancy thereof, in case the same happened to become vacant in the life-time of the said *Wallwyn Cecil*; and the said *Robert Wheeler* being so thereof possessed, the church became vacant in the life-time of the said *Wallwyn Cecil* by the resignation of the said *Richard Reece* the younger, which said vacancy of the church was the first and next vacancy thereof after the said grant to the said *Robert Wheeler* by the said *Wallwyn Cecil* made as aforesaid; whereupon *Robert Wheeler*, by virtue of the said grant, presented to the church so vacant the said *Wallwyn Cecil* his clerk, who thereupon was admitted, instituted and inducted in the time of peace in the time of *George* the second, King of *Great Britain*, &c. and the church afterwards became vacant by the resignation of the said *Wallwyn Cecil*; and the said *Wallwyn Cecil* being so seised of the advowson as in gross by itself as of fee-tail and right as aforesaid, he presented to the church so vacant by the resignation of himself the said *John Davis* his clerk, who thereupon was admitted, instituted and inducted into the same, and long before the suing out of the original writ of the said *James Wallwyn* was and yet is parson of the same church imparsoned in the same on the said presentation of the said *Wallwyn Cecil*; without this, that the said *Philip Cecil* the son in the said declaration named was seised of the said advowson of the vicarage aforesaid as of fee and right in manner and form as the said *James Wallwyn* hath above alledged; and this the said *John Davis* is ready to verify; wherefore he prays judgment if the said *James Wallwyn* ought to have his said action against him, &c.

G. Nares.

The plaintiff imparls from *Trinity* 1762. till *Michaelmas* 1762. from *Michaelmas* till *Hilary* term 1763. 3 Geo. 3. and then the plaintiff replies as follows:

Replication to the plea of *Walwyn Cecil*, the patron of the other defendant. Alledges that *Philip Cecil* being seised in tail, anno 5 *Annæ R.* levied a fine with proclamations.

The word vicarage is not in the fine.

And the said *James Wallwyn* as to the plea of the said *Wallwyn Cecil* says, that by reason of any therein alledged, he ought not to be barred from having his action against him, because he says, that after the suffering of the said recovery in the same plea mentioned, and after the death of the said *Philip Cecil* the elder, the said *Philip Cecil* the younger, then being the heir at law of the said *Philip Cecil* the elder, and then being seised in fee-tail of the advowson of the said church, a certain fine with proclamations, according to the form of the statute in that case made and provided, was levied in the court of the Lady *Ann*, Late Queen of *England*, &c. of the Bench, here, from the day of the *Holy Trinity* in three weeks in the fifth year of her reign, before *Thomas Trevor*, &c. Justices of the same Bench and others, &c. between *John Tryst*, Esq; and *William Powell*, Esq; plaintiffs, and the said *Philip Cecil* the younger, deforciant (amongst other

other things) of the advowson of the said church of Skenfretb, whereof a plea of covenant was summoned between them in the same court, that is to say, that the said *Philip Cecil* the younger, did acknowledge the said advowson to be the right of the said *John*, as that which the said *John* and *William* then had of the gift of the said *Philip*, and he remised and quit-claimed the same from himself and his heirs to the said *John* and *William* and the heirs of the said *John* for ever; and moreover the said *Philip* granted for himself and his heirs, that they would warrant to the said *John* and *William* and the heirs of the said *John*, the advowson aforesaid, against him the said *Philip* and his heirs for ever; and for that acknowledgment, remission, quit-claim, warranty, fine and agreement, the said *John* and *William* gave to the said *Philip* 900 pounds sterling; which said fine so levied was ingrossed, and was afterwards solemnly read and proclaimed in the said court of the Bench, according to the form of the statute in that case made and provided, in manner and at the times following, that is to say, the first proclamation thereof, and thereupon made, was made on the 12th day of *July* in the term of the *Holy Trinity* in the fifth year of the reign of the said late Queen; the second proclamation thereof, and thereupon made, was made on the 19th day of *November* in the term of *Saint Michael* in the said fifth year of the reign of the said late Queen; the third proclamation thereof, and thereupon made, was made on the 3d day of *February* in the term of *Saint Hilary* in the fifth year of the reign of the said late Queen; and the fourth proclamation thereof, and thereupon made, was made on the 2d day of *May* in the term of *Easter* in the sixth year of the reign of the said late Queen, as by the said fine and proclamations thereupon made, now remaining of record in the said court of the Bench at *Westminster*, may more fully appear; which said fine so had and levied as aforesaid, was had and levied to the use of the said *Philip Cecil* and his heirs; by virtue of which said fine, and by force of the statute for transferring of uses into possession, the said *Philip Cecil* the son became and was seised of the said advowson as of fee and right; and being so seised thereof did grant the said advowson, in manner and form as in and by the said declaration is above alledged; and the said *James Wallwyn* further says, that no entry, claim or action was ever made or brought in due time, or at any time whatsoever by the said *William Powell* and *Walter Cecil*, or either of them, or any person or persons whatsoever claiming under them, or either of them, to avoid the said fine, and that by reason of the said premisses, the said term became and was barred and of no effect; and this the said *James Wallwyn* is ready to verify; wherefore he prays judgment, and a writ to the bishop, &c. together with his damages, on occasion of the said impediment, to be adjudged to him, &c.

whereby he became seised in fee before the making the indenture in the declaration, and that the term of 1000 years is thereby barred for want of entry and claim & hoc, &c.

James Hewitt.

And

Replication to
the incum-
bent's plea
takes issue on
the traverse.

And the said *James Wallwyn*, as to the said plea of the said *John Davis* by him above pleaded, as before says, that the said *Philip Cecil* in the said declaration above named, was seised of the said advowson of the vicarage aforesaid, as of fee and right in manner and form as the said *James Wallwyn* hath above alledged; and this the said *James* prays may be enquired of by the country.

James Hewitt.

Demurrer to
the plaintiff's
replication to
patron's plea.

And the said *Wallwyn Cecil*, as to the plea of *James Wallwyn* above pleaded in reply to the said plea of the said *Wallwyn Cecil*, says, that the same replication, and the matters therein contained, are insufficient in law for the said *James Wallwyn*, to maintain his said action against him the said *Wallwyn Cecil*, and that he the said *Wallwyn Cecil* needs not to answer the said replication so pleaded as aforesaid; and this the said *Wallwyn Cecil*, is ready to verify; wherefore for want of a sufficient replication in this behalf, the said *Wallwyn Cecil* prays judgment, and that the said *James Wallwyn* may be barred from maintaining his said action against him, &c. and as to the plea of the aforesaid *James Wallwyn* by him above in reply pleaded to the plea of the said *John Davis*, and whereof the said *James Wallwyn* puts himself upon the country, he the said *John Davis* does so likewise.

G. Nares.

Incumbent
Davis joins
issue.

The plaintiff imparls till *Easter* term 1763. and then joins in demurrer.

The plaintiff
joins in de-
murrer.

And the said *James Wallwyn* says, for that he has above by replying alledged sufficient matter in the law for him the said *James Wallwyn* to have and maintain his said action against the said *Wallwyn Cecil* and *John Davis*, which the said *James Wallwyn* is ready to verify; which matter the said *Wallwyn Cecil* doth not deny, nor any ways answer thereto, but intirely refuseth to admit the verifying thereof, the said *James Wallwyn* as before prays judgment, and a writ to the bishop, &c. together with his damages, on occasion of the said impediment to be adjudged to him, &c. (*James Hewitt.*)

Curia advisare
vult.

And because the justices here will advise themselves of and concerning the premisses, whereof the said *James Wallwyn* and *Wallwyn Cecil* have put themselves upon the judgment of the court here, before they give judgment thereon, a day is therefore given to the said parties here, until the morrow of the *Holy Trinity*, because the said justices are not yet advised, &c. and as well to try the said issue above joined to be tried by the country, as to inquire what damages the said *James Wallwyn* hath sustained by reason of the premisses of and concerning which the said *James Wallwyn* and *Wallwyn Cecil* have put themselves upon the judgment of the court here, if it shall happen that judgment thereon shall be given for the said *James Wallwyn*; therefore the sheriff is commanded that he cause to come here

Venire as
well to try the
issue as to in-
quire of da-
mages if
judgment be
for plaintiff in
the demurrer.

here twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

This case was twice argued at the bar, the first time in *Trinity term* last, by serjeant *Hewitt* for the plaintiff, and serjeant *Nares* for the defendants: the second time by serjeant *Burland* for the plaintiff, and serjeant *Aspinal* for the defendants.

To shew the plaintiff's title, the declaration sets forth, that *Phillip Cecil* on the 24th of *December* 1706. being seised in fee, of the advowson of the vicarage of the church of *Skenfretb* in grofs, as of fee and right by deed of that date, upon his marriage, settled the same to the use of himself for 99 years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to *John Kyrle* and the plaintiff *James Wallwyn* for 500 years, remainder in strict settlement; that the marriage was had, and *Phillip Cecil* thereby became possessed of the advowson for the term of 99 years, and on the 1st of *June* 1724. (the church being then full) granted the next turn to *John Stephens*, who upon the next vacancy presented his clerk *William Stephens*; that afterwards on the 1st of *October* 1731. the church being full of *William Stephens*, *Philip Cecil* died so possessed, and *John Kyrle* died, whereby *James Wallwyn* (the plaintiff) by survivorship became possessed of the term of 500 years, and upon the death of *William Stephens*, presented *Richard Reece* the elder, upon whose resignation he presented *Richard Reece* the younger, upon whose resignation, one *Robert Wheeler* by usurpation presented *Wallwyn Cecil* one of the defendants, who has resigned, and that the church is now void, and it belongs to the plaintiff to present

The plaintiff's title in his declaration shortly stated

The defendant *Wallwyn Cecil* sets up a prior title, and pleads that *Phillip Cecil* senior, the father of *Philip Cecil* in the declaration, in *Hilary term* in the 10th year of King *Wm.* suffered a common recovery of this advowson (amongst other things) with triple voucher (wherein *Philip Cecil* the father was vouched, who vouched *Philip Cecil* the son) to the use of *William Powell* and *Walter Cecil* for the term of 1000 years, which term was subsisting before, and at the time of the making the deed of marriage settlement, and is still subsisting and unexpired, by reason whereof nothing in the advowson ever passed by the deed of marriage settlement, into the possession of *Kyrle* and the plaintiff *James Wallwyn*.

which is rebutted by the defendant *Wallwyn's* plea, which sets up a prior term of 1000 years still subsisting.

The plaintiff's title in the declaration being rebutted by this plea, the plaintiff in answer thereto, replies that after the suffering the recovery in the plea, and after the death of *Philip Cecil* the elder, the said *Philip Cecil* the younger, then being his heir at law, and then being seised in fee-tail of the advowson levied a fine of the advowson of the church of *Skenfretb* wherein he was conusor, to the

Plaintiff replies a fine, and no entry or claim made to avoid it, and says the term of 1000 years is there-
use by barred.

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Q q q

use of himself and his heirs; by virtue of which fine and the statute of uses *Philip Cecil* the younger became seised in fee of the advowson: and being so seised, made the marriage settlement in the declaration, and that no entry or claim by the said *William Powell* and *Walter Cecil* or either of them, or by any other person whatsoever, claiming under them, or either of them, was made to avoid the said fine, and therefore the term of 1000 years is barred and of no effect; to this, the defendant *Walkwyn Cecil* has demurred, and the plaintiff has joined in demurrer.

The general question made in this case was, upon both the arguments, whether a fine of an advowson in gross with proclamations, and non-entry or claim, will bar a term of years. But as the court at last did not determine this question, it is not necessary to set down the arguments, but only the judgment of the court after time taken to consider which was given this term.

Curia: It was admitted by the defendant's counsel on the outset of the argument, that a fine of lands with proclamations, according to *stat. 4 H. 7. c. 24.* and five years past without entry or claim, will bar the lessee for years. *5 Rep. Saffyn's case Cro. Jac. 60. S. C. 1 Lev. 270. Freeman v. Barnes. Cro. Car. 110. Igham v. Morris. Carth. 100. Smith. v. Pearce*: but this is only in the case of lands where the lessee for years is ousted; for no fine shall bar any but those who are out of possession, and whose estate is turned to a right, according to *Margaret Podger's case, 5 Rep. 105. b.* If lessee for years is ousted, and be in reversion disseised, and the disseisor levies a fine with proclamations and five years pass, as well the lessor as lessee are barred by their non-claim, and the lessor shall not have five years after the lease for years expired; so if a copyholder for life or in fee be ousted, and the Lord disseised, and the disseisor levies a fine with proclamations and five years pass, as well the Lord as the copyholder are barred; and the Lord in such case shall not have five years after the death of the copyholder for life. The difference arises from the words of the two savings in the *stat. 4. H. 7.* the first saving extends to those who have present right, and therefore the five years begin to run from the time the fine was levied, because they might enter or bring their action immediately; the second saving extends to those, who at the time of the fine levied, cannot immediately have an action, or make an entry, and therefore they shall have five years after their action, right, title, &c. first accrues. But the case at bar is not the case of a fine of Lands, or of an advowson appendant to a manor, but of an advowson of a vicarage of a church in gross by itself, which at the time of the fine levied, appears by the pleadings to be in the possession of *William Powell* and *Walter Cecil* for a then, and present still subsisting long term of years, which has never been divested or turned to a right;

right; for none of the parties to the fine, at the time of the levying thereof had any thing in this advowson; at that time *Philip Cecil* the conusor in the fine had never presented to the church, nor did his grantee present till 25 years afterwards, and the conusees are mere strangers. It was insisted for the defendants, that an estate in an advowson in gross could not be divested or turned to a right, and that if it could, yet no fine can be levied of it, and if it could, yet no entry or claim could be made within five years after the fine levied, for the church was full at the time of the fine, and continued full for above 20 years, as appears upon this record; to which 2 *Roll. Abr.* 352. pl. 10. was cited in answer to shew that a fine may be levied of an advowson in gross. And *Plowd.* 435. a claim may be made at the church. It is certain that a fine bars nothing that is not divested or turned to a right; it is strange there is nothing in all the books to shew whether a fine with proclamations, according to the *stat. H. 7.* will bar a right to an advowson *in gross*; but whether it will or will not, we have now no occasion to determine in this case, for if it appears most clearly that the parties to the fine at the time of the levying thereof had nothing in the advowson; and therefore upon that single point we are all of opinion, that the plaintiff has no title. and judgment must be for the defendant.

The single point upon which the court gave judgment.

N. Many cases were cited on both sides; but as none of them are applicable to the point upon which the court gave judgment, it would be perplexing the reader to set them down here.

Mather *versus* Brinker. C. B.

IT was moved on the behalf of the defendant to set aside a verdict for the plaintiff without defence at the trial, because the paper book of the issue delivered and paid for, varied from the record of *Nisi prius* in this, *viz.* in the issue delivered in the beginning of the declaration the plaintiff's name was *James* but in the record of *Nisi prius* it was *John*, which was the plaintiff's right name; and in the issue delivered, in that part where the breach is assigned it was, *not regarding his promises, &c.* but in the record of *Nisi prius* it was *regarding his promises, &c.* the word *not* being omitted,

Though the issue delivered varied from the record of *Nisi prius*, the court refused a new trial.

Curia: This is a mere *vitium clerici*; and could not possibly prejudice the defendant at the trial; and the case in 2 *St. A.* 131. is a stronger case; so the rule to shew cause why the verdict should not be set aside was discharged.

Arthur

Arthur Beardmore an Attorney,

Plaintiff,

versus

Nathan Carrington, James Watson, Thomas Ardran and Robert Blackmore, four } Defendants.
of the King's Messengers in ordinary,

A new trial was refused in an action of trespass and imprisonment under a secretary of state's warrant, where 1000 l. damages were given for six days imprisonment, and the entering plaintiff's house and seizing his books and papers.

THIS was an action of trespass and false imprisonment; the plaintiff declared that on the 11th of *November* 1762. the defendants broke and entered his dwelling house at *London*, in the parish of *St. Stephen Wallbrooke*, in the ward of *Wallbrooke*, and continued therein four hours, disturbed him in his possession, broke and forced open several doors of the rooms, and broke and spoiled the locks, bolts and bars thereof, and broke and forced open many boxes, chests, bureaux, scrutores, writing desks, drawers and cupboards of the plaintiff in his house, and the locks thereof, and searched and examined all the rooms in the house, and all the boxes, &c. so broke open; and read over, prayed into and examined all the private papers, books, letters, and correspondences of the plaintiff and his clients, whereby the secret and private affairs, concerns, busineses and circumstances of the plaintiff, and his clients, became and were wrongfully discovered, and made public; and then and there seized, took and carried away 500 printed charts, and a great many other papers, printed and written, (particularly mentioned) and took, and closely imprisoned the plaintiff for nine months, whereby he was hindered from following and transacting his lawful affairs and business, and was thereby put to great expences in his maintenance during his imprisonment; and in obtaining his legal discharge and release therefrom, against the peace, &c. to the damage of the plaintiff 10000 l.

The defendants pleaded first Not guilty; and 2dly, by leave of the court, as to the breaking and entering the dwelling house, continuing there, disturbing the plaintiff in his possession, forcing open the said doors, forcing open the boxes, chests, &c. and examining his private papers, &c. and carrying away the goods, &c. and imprisoning the plaintiff and detaining him for six days and an half; they plead that the plaintiff ought not to have his action against them, because they say, that before the trespass, &c. was supposed to be committed on the 6th of *November* 1762. The Earl of *Halifax* was and yet is one of the Lords of the King's privy council, and one of his principal secretaries of state, and that he on the 6th of *November* 1762. made his warrant under his hand and seal directed to the defendants, four of the King's messengers in ordinary, by which warrant the Earl did in the King's name, authorize and require them

them (the defendants) taking a constable to their assistance, to make strict and diligent search for the said *Arthur Beardmore*, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled the *Monitor or British Freeholder*, number 357, 358, 360, 373, 376, 378, 379, and 380. London, printed for *J. Wilson* and *J. Fell* in *Pater Noster Row*, which contained gross and scandalous reflections, and invectives upon his majesty's government, and upon both houses of parliament, and him the said *Arthur Beardmore* having found to seize and apprehend, and to bring him together with his books and papers in safe custody, before the said Earl of *Halifax*, to be examined concerning the premisses, and further dealt with according to law, &c. that the said warrant was, that day, delivered to the defendants to be executed; that they took *C. W.* a constable to their assistance, and on the same day in the declaration, they went towards the plaintiff's house and found him near to it, and did there seize and apprehend him by virtue of the warrant, and immediately the same day about 10 o'clock in the forenoon being the time when, &c. entered his dwelling-house, (the door being then open) to search for, and seize the books, papers, &c. of the plaintiff, and to bring them with the plaintiff, before the Earl of *Halifax*, according to the exigency of the warrant; and so the defendants go on and justify the trespass aforesaid, and say they delivered the books, papers, &c. to *Lovel Stanhope*, an assistant of the Earl of *Halifax*, and a justice of peace for *Westminster*, to be examined, and that they kept the plaintiff in custody, till he gave bail for his appearance in the King's Bench, the then next term to answer to such matters as should be objected against him, and then the defendants by order of the Earl of *Halifax* discharged the plaintiff, and they say that he was necessarily put to expences by such detainer, which is the same trespass complained of; there is another justification much to the same purpose; the plaintiff replied *de injuria sua propria*, whereupon issue was joined; and at the trial the jury were directed to assess damages under an idea that the trespass and imprisonment committed under this warrant could not be justified by any plea whatsoever; and they found a verdict for the plaintiff, and gave him 1000*l.* damages.

It was moved by the King's serjeants that the verdict might be set aside for excessive damages; upon shewing cause the Lord Chief Justice stated the substance of the evidence given at the trial as follows:

The plaintiff called his clerk *David Meredith*, who proved that on the 11th day of *November* 1762. he found all the defendants in the plaintiff his master's house, and in the private office there, opening the drawers and taking out papers; that they demanded the

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plaintiff's

plaintiff's file of letters, and examined them back till the year 1772. defendant *Carrington* then said "that was sufficient;" afterwards they went into the public office, and there opened the desk, took out the books, and looked into the ledgers, but did not break any desks or drawers open, because the plaintiff opened the same for them; afterwards they took the plaintiff and this witness away in a coach; this witness proved that the plaintiff was then concerned in a great many causes depending, as an attorney, that he sent for Mr. *Wimbolt* to manage his business while he should remain in confinement, that no violence was offered to the person of the plaintiff, and that his wife was permitted to be with him; that this witness had actions depending against the defendants and Lord *Halifax*; that the defendants refused to permit one Mr. *Collet*, who was a client of the plaintiff, to converse privately with him about his business; that while the plaintiff and this witness were confined in the house of the defendants, he the plaintiff was suffered to go into any part of the house, and after six days imprisonment, they were both discharged upon entering into recognizances to appear in the King's Bench the then next term, and for their good behaviour, without paying any fees.

Mr. *Collet*, a client of the plaintiff, swore that the plaintiff was concerned in some causes for him at that time, and that he desired to speak with him in private about his business, but he was refused by the defendants to speak to the plaintiff privately, and to write down what he wanted to say; that pen and ink were refused to him, but the defendants told him he might speak publicly to the plaintiff in the hearing of the defendants if he pleased. It was also proved that the plaintiff was then refused the liberty of writing a letter to Mr. *Alderman Beckford*, one of the members of parliament for the city of *London*; this was the substance of the plaintiff's evidence.

For the defendants, *Lovel Stanhope*, Esq; deputy secretary of state, assistant to Lord *Halifax*, was called, who swore that his business was to look into, and examine all papers touching the government; that he took an oath of office, and was to pay obedience to the orders of the secretary of state; he said that on these occasions when the messengers have a man in custody, they are not to do any thing without his orders; that Lord *Halifax* ordered the plaintiff to be bailed, and that he was continued upon his recognizance from term to term for several terms. It was admitted on all sides at the trial, that there have been a great many precedents of warrants of the like sort with the present for seising persons and papers, &c. and for all sorts of crimes or offences, let the offence be what it would; and this was the substance of the defendants evidence.

For

For the defendants it was said, that for six days and an half confinement in a messenger's house where little or no injury had been done either to the plaintiff's person, house or goods, 1000*l.* were excessive and outrageous damages, and that if the court saw that they were excessive, they had power to grant, and would grant a new trial, even in cases of *tort*. It is said the case of *Wood and Gunston*, *Styles* 466. *Mich.* 1655. is the first instance of granting a new trial; but this seems to be a mistake, for there were new trials granted long before, as appears from this, *viz.* that it is a good challenge to a jurymen to say that he hath been a juror before in the * same cause. *Per Holt C. J.* 2 *Salk.* 648. it is true that in *Roe and Harwicks*, 1 *Lev.* 97. it is said by *Twifden* justice, that the new trial in *Wood and Gunston* was not merely granted for excessiveness of damages, but for tampering with the jury; but in 1 *Sid.* 131. and in 2 *Mod.* 151. it is said that the new trial in *Wood and Gunston* was for excessiveness of damages; that was an action for words, and is a case in point, that the court has power to grant new trials in cases of *tort* for excessive damages; supposing new trials first began in the reign of *Charles* the first, yet it appears from the year-books long before that time, that courts of justice (not having then come into granting new trials) when they saw reason for it, either lessened or increased the damages, as they do in the case of *maibem* to this day, upon view of plaintiff's *maibem* and identifying his person, and for this purpose these cases were cited from the year-books, *Mich.* 22 *Ed.* 3. fol. 11 c. 10. which was a battery. *Mich.* 3 *Hen.* 4. fol. 4. c. 16. *Mich.* 7 *Hen.* 4. 31. b. c. 15. in conspiracy where the plaintiff released part, or the court would have abridged the damages according to their conscience. *Easter* 8 *Hen.* 4. fol. 23. c. 9. the justice of *Nisi prius* thought the damages too little, yet they would not increase them without seeing the *maibem*. *Mich.* 19 *H.* 6. 10. b. c. 28. *Trin.* 32. *H.* 6. 1. a. c. 2. in debt the parties were at issue, and the jury found for the plaintiff damages 6*s.* 8 *d.* and costs 20*s.* the court increased the damages to 1*s.* and 4 *d.* more. *Dyer* 105. *Palm.* 314. From these ancient cases it was argued that courts of justice have in all times considered themselves authorized to review the damages given by juries in all kinds of actions, either to abridge or increase them; and since that practice has been disused, and abridging damages by the court has been looked upon as unconstitutional, new trials have been granted for excessive damages.

* N. This might be in the case of a venire facias de novo awarded, where a mistrial has been had.

For the plaintiff it was said, that new trials can only be granted in cases where the court can clearly see that the jury is mistaken, or have misbehaved themselves; all the cases of new trials tend to prove that where the court have no measure to direct them, they cannot grant a new trial, there must be some infallible mark for

them to go by, in the case; no two judges in the world can agree what damages ought to be given in the present case, for damages here lie in speculation. That the misconduct of juries seems to have been the first occasion of new trials. It is said new trials were first introduced to prevent attaints, but an attaint would not lie in this case, for there is no possibility of pointing out how far the damages are excessive or not. The case in *Styles* 466. was not for excessive damages, but for tampering with the jury; it was said in that case to be a *packed business*, in the case of Lord *Townsend* for words 2 *Mod.* 150. the court said they had no ground, whereby they could measure the damages, and refused a new trial. *Alb* and *Alb. Comb.* 357. is not to the purpose; Lord *Holt* asked the jury upon what ground they went, which they refused to answer him, and so were guilty of a misconduct.

Curia: We are called upon, on our oaths to say, whether these are excessive damages or not, and ought to have very clear evidence before us, before we can say they are excessive. The jury were directed to assess damages for the plaintiff according to the evidence given, under an idea, that the defendants could not by law justify the trespass under this warrant by any manner of plea whatsoever. It is clear that the practice of granting new trials is *modern*, and that courts anciently never exercised this power, but in some particular cases they corrected the damages from evidence laid before them. There is great difference between cases of damages which be certainly seen, and such as are ideal, as between *assumpsit*, *trespass for goods* where the sum and value may be measured, and actions of *imprisonment*, *malicious prosecution*, *slander* and other *personal torts*, where the damages are matter of opinion, speculation, ideal; there is also a difference between a principal verdict of a jury, and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed themselves without any inquest at all; only in the case of *maibem*, courts have in all ages interposed in that single instance only; as to the case of the writ of inquiry in the year-book of *H. 4.* we doubt whether what is said by the court in that case be right, *That they would abridge the damages unless the plaintiff would release part thereof*, because there is not one case to be found in the year-books wherever the court abridged the damages after a principal verdict, and this is clear down to the time of *Palmer's Rep.* 314. much less have they interposed in increasing damages, except in the case of *maibem*; one side says no attaint lies (in cases of tort) for excessive damages; the other side says it does; we give no opinion as to that point; but it is said in 100 cases in the books that an attaint does lie. See 10 *Rep.* 119. Lord *Cbeney's* case.

All, or most of the cases of new trials, are where juries have
 * misdeameaned themselves contrary to their oath; in the case in * The judge
Stiles 466. the misconduct of the jury was certainly an ingredient, who tried the
 and so it appears from the case in 1 *Lev.* 97. Some books say it cause used to
 was a trial at bar, and it is highly probable there was some evidence certify to the
 that the jury had been tampered with; and this was certainly the court the
 very first case of a new trial, and from that period the courts have misbehaviour.
 exercised the power of granting new trials in several cases; as *Cro. El.* 189,
 when the jury find contrary to the judges directions in point of 411, 616.
 law, when they find directly contrary to the evidence, (that is to 3 *Keb.* 351.
 say) against evidence all on one side, for if there be evidence on Styl. 448.
 both sides, the court never interposes in that case; as to granting Moor 451,
 the first new trial in *Stiles* 466. there is great reason (as was said 452.
 before) to think it was misbehaviour in the jury; it was an action *Bacon v. r.*
 for words, and 4000*l.* damages, where the court refused to grant a *Hutchinson,*
 new trial; and if a court could not say that those damages were exces- *Easter term*
 sive, they can hardly say that damages are excessive in any case of 8 *Ann. C. B.*
 slander whatever; and this case has never been contradicted or de- a rule to stay
 nied to be law; the case of *Asb* and *Asb, Comb.* 357. was plainly the judgment
 for the misdemeanor of the jury in refusing to answer the judge until the
 when he asked what ground or reason they went upon; to be sure judges certifi-
 judges are to advise, but not to controul juries; and my Lord *cate.*
Holt and the King's Bench did right, in granting a new trial in that case. *Palm.* 325.
 In the case of *Wilmot v. Berkley, Trin.* 31 & 32 *G. 2. B. R.* which Concerning
 was an action for criminal conversation, the jury gave 500*l.* da- misdemeanor
 mages against the defendant, and upon affidavits that he was only of juries, see
 a clerk in low circumstances, and unable to pay so large a sum, it 2 *H. P. C.*
 was moved for a new trial, but the court refused to grant even a 306, 307, &c.
 rule to shew cause, because in cases of *tort* the jury are the only *Cro. Jac.* 210.
 proper judges of the damages: We are now come to the case in c. 2.
 1 *Str.* 691. *Chambers v. Robinson*, which seems to be the only case
 wherever a new trial was granted merely for the excessiveness of
 damages only; we are not satisfied with the reason given in that
 case, and think it of no weight, and want to know the facts upon
 which the court could pronounce the damages to be excessive; the
 principle on which it was granted, mentioned in *Strange*, was to
 give the defendant a chance of another jury; this is a very bad rea-
 son, for if it was not, it would be a reason for a third and fourth
 trial, and would be digging up the constitution by the roots, and
 therefore we are free to say this case is not law; and that there is
 not one single case, (that is law), in all the books to be found,
 where the court has granted a new trial for excessive damages in
 actions for *torts*.

Markham v.
Middleton,

Trin. 19 *Geo. 2. B. R.* Per curiam, the jury are the sole judges of the damages in cases of *torts*.

It was strongly argued at the trial of this cause, that the jury were to measure the damages by what the defendant had suffered by this trespass and six days and an half imprisonment; but this was thought a gross absurdity by the judge who presided there.

We desire to be understood that this court does not say, or lay down any rule that there can never happen a case of such excessive damages in *tort* where the court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush.

The nature of the trespass in the present case is joint and several; and the plaintiff has still another action against lord *Halifax*, who it is said is more culpable than the defendants, who are only servants, and have done what he commanded them to do, and therefore the damages are excessive as to them: but we think this is no topic of mitigation, and for any thing we know the jury might say, we will make no difference between the minister who executed, and the magistrate who granted this illegal warrant;" so the court must consider these damages as given against lord *Halifax*, and can we say that 1000 *l.* are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and prys into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days; it is an unlawful power assumed by a great minister of state; can any body say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects; we cannot say the damages of 1000 *l.* are enormous, and therefore the rule to shew cause why a new trial should not be granted must be discharged. *Per totam curiam.*

N. Hil. term

8 Geo. 3.

B. R. Smith v. Boucher In trespass and imprisonment damages on a writ of inquiry, 200 *l.* Skinner moved so set it aside for excessive damages; but *per curiam*, in *tort* the jury are the proper judges.

Trinity

Trinity Term

4 Geo. 3. 1764.

Grey *versus* Jones executrix, &c. C. B.

THIS was a *scire facias* against the defendant to shew cause why the plaintiff should not have execution of his debt and damages recovered by judgment of the court against her testator; the defendant pleaded, that the plaintiff ought not to have his *action* against her, because she says that she the defendant, after the recovery of the judgment, and before the suing forth the writ of *scire facias*, to wit, on the first day of October in the year of our Lord 1763. at K. in the county of S. paid to the plaintiff the debt and damages in form aforesaid recovered; and this she is ready to verify; wherefore she prays judgment if the plaintiff ought to have his said action against her, &c. the plaintiff demurred, and the defendant joined in demurrer. It was objected for the plaintiff, that the plea was bad, in alledging that the plaintiff ought not to have his *action*, &c. for that a *scire facias quare execution non*, &c. is not an *action*. To this it was answered for the defendant, that a release of all *actions* will bar a *scire facias* upon a judgment. 1 *Inst.* 190. *b.* that all writs, whether original or judicial, which require an answer by way of plea, are properly actions, or suits, 2 *Salk.* 603. 2 *Inst.* comment on *stat. Westm.* 2. c. 45. a *scire facias* to repeal a patent is an original action.

To a *scire facias* to shew cause why plaintiff should not have execution on a judgment, the defendant pleads that plaintiff ought not to have his action instead of ought not to have execution, and well enough.

J. Rep.
1. Vol. 260.

Curia: This plea is a little informal; the old way of pleading was for the defendant to say, that the plaintiff ought not to have execution, &c. by virtue of the recovery aforesaid, because, &c. but as we must take this plea to be true, and not a sham plea, we will support it if possible Lord Coke says, that albeit a *scire facias* be a judicial writ, yet because the defendant may thereupon plead, this *scire facias* is accounted in law to be in nature of an action; and therefore a lease of all actions is a good bar of the same. *Co. Lit.* 290. *b.* Wherever a writ requires a plea, it is an action; and though a plea be informal in its conclusion, or beginning, yet if

if it prays a right judgment; courts have always rejected the informal words, and given judgments according to the right and merits of the cause. So the plaintiff moved for leave to withdraw his demurrer on payment of costs, and to reply *de novo*; which was granted,

Grey against Sir Alexander Grant, Bart. a Member of Parliament. C. B.

In a little
assault and
battery 200l.
damages not
excessive, and
a new trial
was refused.

THIS was an action of assault and battery, tried at *Guildhall London*, wherein the jury gave a verdict for the plaintiff, and 200*l.* damages; and now it was moved to have the verdict set aside, and a new trial, for excessiveness of damages. The case upon the evidence was as follows:

Captain *Holland* of the ship *Nancy*, having brought from the *West-Indies* a turtle for the plaintiff Mr. *Grey*, and which was his property, and it having been, by mistake, delivered to the defendant; the plaintiff went to him, and demanded it of him; but he said he had invited some friends to dine with him upon it, and refused to deliver it, or to pay for it, and that the plaintiff might take his remedy; and pointing at the plaintiff, said, "If *that man* was to ask a turtle of me I would give him one"; the plaintiff answered and said this is very ungentle, and the defendant shoved the plaintiff out of his house with his elbow, who thereupon asked the defendant if he would waive his privilege of parliament, but the defendant refused to do it; plaintiff then said to him, you are a scoundrell, and defendant gave him a blow upon the face, which caused a black eye; the plaintiff also demanded the turtle by a letter, and required the defendant to restore it; captain *Holland* also informed the defendant that the turtle had been delivered to him by mistake, and desired him to restore it, but the defendant said "A turtle I have got, and what I have got I will keep"; the captain told the defendant if he wanted a turtle to entertain his friends, there was one then at the *Jamaica* coffee-house to be sold, and he might buy *that*; the defendant answered, "you may buy it yourself, I will keep *that* I have got;" then the plaintiff said to the defendant again, I come here to demand my right, and if you will not give it me I will take my remedy at law, if you will waive your privilege; the defendant answered and said, "In such a trifling business as this I will not waive my privilege, but in a matter of property I would waive it". One *Falconer* was called as a witness to prove he was present at this dispute, and could not remember that any blow was struck by the defendant, he had forgot every thing which made in favour of the plaintiff, but remembered every

every thing which made for the defendant; so it was a measuring cast whether a blow was struck or not; however the jury found for the plaintiff, and 200*l.* damages.

Curia: This was a quarrel between two gentlemen, and has been properly tried by a special jury of merchants of *London*, who are the proper judges of the damages; when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages; the plaintiff has been used unlike a gentleman by the defendant in striking him, withholding his property, and insisting upon his privilege, all of them tending to provoke him to seek his revenge in another way than by law, and therefore we think the damages are not excessive. Rule to shew cause why a new trial should not be had, discharged *per totam curiam*.

Michaelmas Term

5 Geo. 3. 1764.

Cox versus Rolt. C. B.

THIS was a special action upon the case against the defendant for deflowering the plaintiff's daughter *per quod servitium amisit*; the defendant having pleaded the general issue, now moved for leave to withdraw that plea, and to plead the same plea again, together with the plea of the statute of limitations; upon an affidavit made by the defendant's attorney, that at the time when he was bound to plead by the rule of the court, and then pleaded the general issue only, he was not fully instructed by his client what to plead; and upon citing a similar case in *B. R. of Vile v. Barry*, wherein that court permitted *this*, upon an affidavit made by the very same attorney, that he was pressed for a plea, and was obliged to plead before he was instructed, and therefore pleaded the general issue to prevent judgment.

Practice.
The court refused to permit a defendant to add the plea of the statute of limitations.

PART II.

T t t

Upon

Upon shewing cause it was insisted for the plaintiff, that the general rule of both the courts of *B. R.* and *C. B.* is to permit a defendant to withdraw a special plea, and plead the general issue, but not *vice versa*; and many cases were cited to shew this to be the practice, which was agreed to be so by the court; and it was said that in the case of *Vile v. Barry* the attorney was surprised, not instructed, and pleaded the general issue to prevent judgment; and for that reason the court of King's Bench deviated from the general practice in that particular case; but here the affidavit made by the same attorney does not go so far, and therefore the rule ought to be discharged.

Curia: It is a good maxim, that the law will rather suffer a particular mischief than a general inconvenience; general rules of practice must be strictly observed for the sake of certainty, or practitioners will be negligent. Indeed under very special circumstances, the court will permit a defendant to add a special plea; in a late case of public concern, the defendant being advised by his counsel that he might give the secretary of state's warrant in evidence upon the plea of the general issue, pleaded *that* plea only; the judge before whom that cause was tried, having been of a contrary opinion, it was afterwards moved in a similar case of *Wilkes v. Webb*, to withdraw the general issue and plead the same plea again, and a special justification under the secretary of state's warrant, which was allowed by the whole court; the defendant at the time of pleading the general issue only, being ill advised by his counsel, and not knowing then the opinion of the judge who tried the former similar cause; besides *that* special plea was allowed to try the real merits of the case, but the plea of the statute of limitations is not to be favoured, because it excludes the merits; the court gives leave to add a plea for the furtherance of justice, but to permit this plea of the statute of limitations, would not be so. The rule was discharged *per totam curiam*. Serjeant, *Hewitt and Davy* for the defendant, Serjeant *Burland* for the plaintiff.

Firebrass, on the demise of Jane Symes widow, *versus* Pennant. C. B.

The grant of a lord of a manor of copyhold lands to his wife immediately is void.

EJECTMENT of lands in the county of *Somerset*, tried at the assizes 1 April 1763. verdict for the plaintiff subject to the opinion of the court upon this case; which states, that the premises in question are parcel of the manor of the rectory of *Compton Martin* in the county of *Somerset*, and have been held by copy of court roll of that manor time out of mind, of which manor the rector of the same rectory for the time being is the Lord.

That

That the Reverend *William Symes* clerk, on the 20th of *February* 1726. was rector of the said rectory, and lord of the manor of the same rectory; that the premises in question, being in the hands of the said *William Symes* the lord upon the death of the last tenant thereof, as rector of the said rectory, and lord of the manor, did on the 20th of *February* 1726. demise the premises in question to the lessor of the plaintiff *Jane Symes*, by copy of court roll; to hold to the said *Jane Symes*, *Richard Symes* and *Christian Symes* for the term of their lives, and the life of the youngest liver of them successively, according to the custom of the said manor, as they were named in the said copy.

That at the time of the demise to the said *Jane Symes* she was the wife of the said *William Symes* lord of the manor, that the said *William Symes* died in the year 1756. and that the defendant upon his death became, and still is rector of the said rectory and lord of the manor, and thereupon entred into the premises in question, and is in possession thereof.

The question is, whether the demise by copy of the court roll, by a lord of a manor to his wife, be good in law or not?

This case was argued twice at the bar, and being quite new, no authority could be cited to shew, whether the grant of this copyhold immediately from the husband (lord of the manor) to his wife was good or bad; nor did it appear to the court, that there was ever any such custom in *this*, or any other manor, for a lord to grant lands by copy of court roll to his wife immediately, without the intervention of a third person, and therefore it would be nugatory, to set down the cases cited by the counsel who argued; for the court cited no case that I heard.

Curia: As this was a provision by a husband for his wife, we should be glad (if possible) to get over that maxim in law, "*that a husband and wife are one person*", and therefore cannot grant lands to one another; so where there is no particular custom in a manor, the common law must take place; this is an original voluntary grant by the husband to the wife, who cannot by law take immediately from him, any more than a monk who is dead in law, and considered as no person; so here is no person to take, for the wife and husband are only one person. We are dealing with a fundamental maxim of the common law and might as well repeal the first section of *Littleton*, as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening. The *Posse* was ordered to be delivered to the defendant, *reluctante tota curia*.

Wilkes, Esq; against The Earl of Halifax

61346 196

The title of the declaration made agreeable to the truth of the fact.

THE *pluries distringas* to compel the earl to enter his appearance was returnable on the morrow of *Saint Martin* in this term; who then appeared, after having delayed the plaintiff by *essoining*, and privilege of parliament for several terms, whereupon the plaintiff declared of this term of *Saint Michael* generally which is considered by relation as a declaration of the first day of the term in law; during the delay in this cause, and before the earl could be compelled to appear, Mr. *Wilkes* was outlawed upon an information filed by the attorney or solicitor general, and therefore the defendant wanted to plead the outlawry in abatement, which being a dilatory plea must be pleaded within four days from the time of the filing the declaration, or it cannot be pleaded at all; and (if the declaration is to be considered as of the first day of the term which it seems it is in point of law) then the defendant was too late to plead this dilatory, and it cannot now be received; and therefore it was moved on the part of the defendant, that the plaintiff might be obliged to intitle his declaration, "Of the morrow of *Saint Martin*" in the term of *Saint Michael* in the 5th year of the King", according to the truth of the case; for the earl did not appear till that day, and before he was in court the plaintiff could not declare against him.

Upon shewing cause, it was said for the plaintiff that the intitling his declaration as he has done, of the term generally, is not erroneous, and therefore he has a right to intitle it in this manner; that the court pays great regard to legal fictions. The plaintiff died the first of *December*, judgment was entred the 6th, and held good by relation. 2 *Barnes* 205. The defendant died the 13th of *February* the judgment signed the 21st held good. 2 *Barnes* 208. and S. P. 209. defendant died 20th of *April*, on the 21st of *April*, application was made (on an affidavit from *Essex*, sworn 15th of *April*) for leave to enter up judgment on an old warrant of attorney, a rule was made and judgment was signed the 21st of *April*. 2 *Barnes* 212. That the defendant here having delayed, the plaintiff is not intitled to favour, and if he had done as he ought to have done, he would have been in court four terms ago.

For the defendant it was said, that they did not ask this as a favour, but that the court would order the records to be made and entered according to the truth of the facts in the proceedings, and they have often done this. 2 *Barnes* 271. That the plaintiff who is an outlawed person is no more intitled to be favoured than the defendant; the words in the titles of declarations are the words of

of the court, and they will see that they are true according to the act done in court. 1 Barnes 10.

Curia: The defendant does not ask this alteration to be made in the title of the plaintiff's declaration as a matter of favour, but of right; and if he has that right we are bound *ex debito justitiæ* to make this rule absolute; can it be said that the defendant has forfeited his right of pleading in *abatement*, or any *dilatory*, when four days are not passed since he was in court, and before *that* time the plaintiff could not, by law, declare against him, and the defendant may plead whatever plea he pleases; therefore the rule must be made absolute, and the title of the declaration, according to the truth, and fictions in law shall never do injustice, for *in fictione juris semper est æquitas*.

Easter Term

5 Geo. 3. 1765.

Smyth *versus* Reynolds. C. B.

TROVER for 150 casks of butter; upon Not guilty, there was a verdict for the plaintiff, subject to the opinion of the court upon this short case; the plaintiff's ship lying in the river *Thames* with the butter on board brought from Ireland, the defendant (a custom-house officer) went on board, and before the hatches were opened, or bulk broken, or any goods landed, or offered to sale, seized the butter as contraband. The single question was, whether the seizure was lawful.

There is no right to seize contraband goods in the river before the goods are landed or offered to sale.

Curia: We are all of opinion that the seizure was unlawful, and that there is no right to seize, unless the goods be landed, or offered to sale; the mere bringing the ship into port gives no right to seize; and this is our opinion grounded on the *stat. 18 Car. 2. c. 2.* and *20 Car. 2. c. 7.* so there was judgment for the plaintiff *per totam curiam*.

PART II.

U u u

Bartlet

Bartlet *versus* Robbins. C. B.

Costs not allowed where defendant pleads a tender of half a guinea which is found against him, if the judge certifies upon the 43 Eliz. that damages are under 40s.

CASE upon *assumpsit*; the defendant pleaded a tender of half a guinea which the plaintiff took out of court, and proceeded for more; there was a verdict for the plaintiff, damages 1*l.* 1*s.* and the judge certified under the *stat.* 43 *Eliz. cap.* 6. that the damages to be recovered in this action did not amount to 40 shillings, but to 1*l.* 1*s.* and no more. And now serjeant *Burland* moved that the prothonotary might tax the plaintiff full costs *de incremento*; alledged that the judge ought not in this case to have certified, because the defendant has pleaded a tender, which being found false, he has by his own wrong pleading increased the costs; so on the other statutes which say that the plaintiff shall not recover costs if the judge does not certify, yet where there is a special pleading he is intitled to his costs; and if a defendant remove a cause out of an inferior court, he is not intitled to this certificate, because it was his own fault to remove the cause, and thereby put the plaintiff to greater expences.

C. Justice: I believe that in some cases such a rule has obtained, because the defendant by his own fault has rebutted his right to costs, by bringing another matter in question.

Clive Justice: In an action for words, "that the defendant stole a hen," the defendant justified, there was a verdict for the plaintiff, and damages less than 40*s.* The court of King's Bench refused to allow more costs than damages.

Ch. Justice: This action is clearly frivolous, and the plea of tender does not alter the case; So the rule for full costs was denied.

English *versus* Burnell and Ingham. C. B.

Replevin. Avowry that defendants were owners and occupiers of certain messuages, and prescribe for common in the locus in quo, and avow damage feasant, this is a bad prescription.

REPLEVIN for taking plaintiff's cattle; avowry that *Burnell* was seised in fee and in possession of a certain ancient messuage and that *Ingham* was tenant and occupier of another ancient messuage, and that *Burnell* as owner and occupier of the messuage then in his possession, and *Ingham* as owner and occupier of the messuage then in his possession, and all other occupiers of the said messuages have had time out of mind, and of right ought to have common of pasture in the *locus in quo*, &c. and avow they took the cattle *damage feasant*; the plaintiff pleads in bar, and traverses the right of common, and thereupon issue is joined, and a verdict was found for the defendants.

Serjeant

Serjeant Nares for the plaintiff moved in arrest of judgment, and objected that the avowry is ill, the prescription for right of common being confined to the *occupiers* of the messuages, who have but a mere temporary, and not a permanent interest therein; for that such prescriptions ought to be made by those who have a permanent interest, 22 E. 4. 17. tenant for life cannot prescribe, and where there is no perpetuity there can be no prescription. *Bro. Prescription*, pl. 77. 6 Rep. 60. a. *Gateward's case*, the third resolution; this is contrary to the nature and quality of common, for every common may be either suspended or extinguished, but such common as this shall be *so* incident to the person (the occupier) that no certain person can extinguish it, but as soon as *he* who releases it, &c. removes, the new occupier shall have it. *Gateward's case*, 6 Rep. 60. a. the fourth resolution. *Hunt v. Beaucham* in Easter term 33 Geo. 2. B. R. trespass, Plea that every *inhabitant* of the parish residing and dwelling in the parish, and being an *occupier* of an ancient messuage had a right of common, &c. this was determined by *Gateward's case* to be a bad prescription. *Austye v. Fawcner*, Cro. Eliz. 445. replevin, The defendant avows for *damage feasant*; the plaintiff justifies, for that he had a close adjoining to the defendant's close, and that the defendant and all the *occupiers* of the said close from time whereof, &c. had used to repair the fences, and for not sufficiently repairing the beasts entred, &c. issue was taken upon the prescription, and found for the avowant, and in arrest of judgment, it was held that the prescription, *that every occupier*, &c. was too general; indeed it is said in that case, that it was aided by the statute of jeofails, but in consequent determinations *that rule is not allowed*. *Croutber v. Oldfield*, 1 Salk. 364. that a title defectively set forth, may be cured by a verdict, but a bad title set forth never can be cured. A prescription that the possessors ought to repair fences, was held bad, and judgment arrested after verdict. 2 Rol. Rep. 288. *Palmer* 331. S. C. Cro. Jac. 665. S. C. *Weekly v. Wildman*, 1 Ld. Raym. 405. he observed the particular manner of joining the two defendants in one avowry, that though it might be good as to one of them, (*Burnell*,) who is seised in fee, yet it cannot be good as to the other, and a plea cannot be good in part, and bad in part. 1 Stra. 509. 1 Saund. 28. 2 Cro. 27.

Bro. Prescription, pl. 76. in trespass; the *inhabitants* prescribe for common, &c. *Per totam curiam*, Tenants at will cannot prescribe *in jure proprio*, *sed in jure domini sui*; but the defendant may say that the usage of the vill of D. hath been from time whereof, &c. that the inhabitants have had a way over the land of the plaintiff to the church, &c. or that they have been quit of toll to the mill, &c. tenants at will cannot prescribe in a thing which endureth *in perpetuum*, &c. but in the usage and custom of the vill; *so nota le diversitie*, see also *Bro. Prescription*, pl. 28. Cro. Jac. 152.
2 Show. 195.

Burland serjeant contra : In this avowry, one of the defendants avows as *owner* and *occupier* of a tenement, and the other as *occupier*, the issues are found for the defendants; the plaintiff did not take advantage by demurring; as he might have done, therefore he is not intitled to favour. Admitting the argument on the other side, we have sufficiently set forth a title in the avowants; where the plaintiff complains of an injury done to his soil, there the defendant, in his justification, must prescribe in a *que estate*, because the plaintiff complains of an injury done to his soil, but in *trespass* for taking goods, it is sufficient for the defendant to say that he was *possessed* of the *locus in quo*, and the goods were *damage feasant*; so for taking cattle, a justification that the defendant was *possessed* of a close and intitled to common, and took the cattle *damage feasant* is good, and there is no difference between a *replevin* and *trespass* for taking cattle only; for *replevin* is only an action for taking the cattle. In easements, &c. it is sufficient to declare upon the possession. If an avowry shews the *locus in quo* belongs to the plaintiff, it must set forth a *que estate*, otherwise it need not; and though an avowry is informal, it is cured by verdict, our title is only defective in the setting forth, and so is cured, as in *Cro. Eliz.* 445.

2 Vent. 181.

Hewitt serjeant of the same side with the defendant, there are two questions, 1. Whether the avowry be good; 2. Whether it be aided by the statute after verdict. Here the injury complained of, is only for taking the plaintiff's cattle, no right to the close is set forth; against a wrong-doer it is sufficient to set forth a *possession*, as in the case of a *way, common*, &c. so in all declarations, and an avowry is in the nature of a declaration. 2 *Ld. Raym.* 923. in actions against wrong-doers it is enough to shew *possession*.

1 Salk. 335.

Ld. Ch. Justice: Have you any case to shew that an avowry is considered as a declaration? do you argue only on principle?

Hewitt serjeant: Only on principle. Distress is the first process in this *replevin*, and the avowry is the declaration. 11 *Mod.* 219. *Harrington v. Bush*, stat. 32 H. 8. c. 30. here the true gift of the action has been tried, and it appears the plaintiff has been a wrong-doer. *Brown v. Bookill*, *Skin.* 115, 213. the reason there given is, that it must be supposed the judge at the trial made him shew his title. 1 *Saund.* 216, 19. by pleading over, the plaintiff here has waived the objection. In *Gateward's* case, the title was such as he could not have as an *inhabitant*, but might as an *occupier*. *Freeman v. Jugg*, B. R. *replevin*, for taking a horse; the defendant avowed that he was *possessed* of the *locus in quo*, and took the horse *damage feasant*; plea in bar, issue joined, and trial had. In arrest of judgment, it was objected that the defendant in his avowry ought to have shewn the owner of the fee; but the court held the avowry was cured by the plaintiff's pleading over.

Nares serjeant in reply : It seems to be admitted by the last case cited by my brother, that *possession* is not sufficient in an avowry. I admit that in trespass for taking cattle *possession* is a good plea, but in *replevin* it is otherwise, for there the avowant must shew a title in fee, or derive his title from him who has the fee, toin title him to have a return of the cattle; and the *stat. 11 Geo. 2. c. 19.* was made to excuse the avowant from shewing his title in an avowry for a distress for rent. 2 *Stra.* 847. though in the case of easements you may declare upon the *possession*, yet you must prove a prescriptive right at the trial. After a trial, the court will only presume every thing was proved to make good the title pleaded, but not to make a good title.

Ch. Justice : Is there any case to shew that possession is sufficient in an avowry ? the court took time to consider till the latter end of the term, when the Ld. Chief Justice delivered the opinion of the court.

Lord Ch. Justice : It is objected that the right of common is laid in the *occupiers* only. The defendant's counsel did not pretend it would be good where it is necessary to set forth a title; for it is now settled law, and the reason in *Gateward's* case is convincing. The answer given is, that in *trespass* there is no occasion to set forth a title against a stranger, but the defendant's counsel produced no case to shew that *replevin* is similar to *trespass*.

In *replevin* the avowant must justify, and shew by what authority he distrains; the power of distress is an extraordinary power, and almost the only case wherein a party is his own carver. There are many cases directly in point, *2elv.* 148. there is a great difference between *replevin* and *trespass*, because the avowant being to have a return of the cattle must shew a title *in omnibus*; otherwise in *trespass*, in which the defendant need only plead an *excuse*. 2 *Lutw.* 1231. the avowant must alledge what estate he is seised of, therefore this avowry is bad; the question is, whether the verdict will cure it? the distinction is between a title *defectively set forth*, and a *defective title*; where a title is *defective*, the statutes of *jeofails* do not extend to it, and the jury cannot examine into what was not set forth; the statutes therefore cannot aid it, and *per totam curiam*, The judgment must be arrested.

Johnson *versus* Kennion. C. B.

Bill of exchange.
In an action by the indorsee against the drawer, tho' the indorfor has paid part of the money to the indorfee, he may recover the whole sum in the bill against the drawer.

ACTION upon the case upon a bill of exchange brought by *Johnson* the indorsee against *Kennion* the drawer thereof, payable to *Benson*, or his order, who indorsed it to plaintiff in order to get it discounted; plaintiff delivered the bill to *Baldwyn*, who advanced the whole money; *Benson* paid 232*l.* to the plaintiff, then *Baldwyn* re-delivered the bill to the plaintiff, who repaid him the residue. There was a verdict for the whole 1000*l.* in the bill. Upon shewing cause why there should not be a new trial, the plaintiff the indorsee having been paid part of the sum in the bill;

Ch. Justice: Consider the nature of these contracts, they are negotiable bills passing through the hands of divers persons, and though there are many indorsements on the bill, yet there is but one security for one sum of money, and he who has the possession of the bill may bring his action; where there are many indorsers, the indorsee has a right of action in succession, but there is but one right of action under the bill against one person at one and the same time. The bill being in one indorsee's hand, the indorfor pays a part, and the objection is, that this ought to be considered as a payment for the drawer; but I think *toto calo* it is otherwise, because the indorfor is no servant, nor is agent to the drawer. Suppose *Benson* had paid the whole 1000*l.* to *Johnson*, and *Benson*'s name had not been struck out, and an action had been brought in *Johnson*'s name against the drawer, will you say the action will not lie? Suppose after a recovery against *Kennion* he had run away, could *Benson* have had a right to come against *Johnson* before any satisfaction? the bill is a security for every indorfor as *cestuy que trust*; I think it is a plain case that *Johnson* has a right to recover the whole money, and when he receives it, he will have received 232*l.* of *Benson*'s money; the defendant has no reason to complain.

Bathurst J. of the same opinion. You cannot split the bill so as to subject the party to different actions.

Gould Justice: The thing is very clear, when the defendant has paid the 1000*l.* there is an end of the contract. Where the Drawer of the bill has paid part, you may indorse it over for the residue; otherwise not, because it would subject him to variety of actions. A new trial was denied.

Doc on the demise of Neale *versus* Roe. C. B.

IN ejectment: Serjeant *Jephson* moved for judgment against the casual ejector upon an affidavit that a person tendered a copy of the declaration to the wife of the tenant in possession in the shop, and would have read to her the notice to appear; but she refused to hear it, or to receive the declaration, and she said she would have nothing to do with it, and turned out of the shop, and shut the door after her, whereupon the declaration was left in the shop.

Process.
Service of an
ejectment
what is good.

Batburst and *Gould* justices (only in court) thought this not quite sufficient service, as the notice ought to have been read aloud in the shop, though no person was there; but as this was a hard case, they made rule to shew cause why this should not be deemed good service.

In a few days afterwards the court made a like rule, on an affidavit that the tenant kept out the way to prevent being served, on the motion of serjeant *Hewitt*.

Trinity

Trinity Term

5 Geo. 3. 1765.

Ross versus Walker. C. B.

Prohibition.
A pilot is a
mariner, but
cannot sue in
the Admiralty,
if his
work be within
the body of
a county.

A Pilot was sent for to *Gravesend*, to come on board the ship *Oxford*, being in *Sea-Reach*, who accordingly went on board of her there and piloted her from thence to her moorings at *Deptford*, and for his wages due to him upon that account has instituted a suit in the court of Admiralty; and now it was moved for a prohibition upon a suggestion that both the contract and the work done, were within the body of the county and an affidavit that *Sea-Reach* is within the body of the county.

Against a prohibition it was said that a pilot is a mariner, and a prohibition shall not go to the Admiralty to stay a suit there, for mariners wages, though the contract was upon the land. 1st, Because it is more convenient for them to sue there because they may all join. 2dly, According to their law, if the ship perish, the pilot loses his wages. 1 *Vent.* 146. 1 *Salk.* 31. 1 *Ld. Raym.* 632. 1 *Vent.* 343. 2 *Vent.* 181. That if a contract be with sailors on the land to enter on board and go an intended voyage, and they accordingly enter on board, rigg the ship, and do work and labour there in the river, though the voyage never proceeds, they may sue in the Admiralty for their wages, and a prohibition shall not go, notwithstanding both the contract and the labour was done within the body of the county. 2 *Ld. Raym.* 1044, 5. *Wells v. Osman.* 6 *Mod.* 238. S. C. In 2 *Stran.* 858. the master cannot sue in the Admiralty for his wages, but all the mariners may. In 1 *Ld. Raym.* 632. the same distinction is taken, and it is out of compassion to these poor men that they may all join in the court of Admiralty; they do not know who is the master, or is to pay them, so they proceed against the ship. That there is no doubt but a pilot is a mariner, the master covenants with the owners to find a pilot, and they to pay him. *Molloy cap.* 9. s. 2. *Malyn's Lex Mercat.* 104. speaks of a pilot's being a mariner, a surgeon during the voyage is a mariner.

Suppose

Suppose an *India-man* in distress in the river, and 40 mariners are necessary to be had from the land, must these poor men be obliged to bring several suits at common law? it would be very hard.

For a prohibition it was said, that as it was now clear on all hands that both the contract and the labour were within the body of the county, the admiralty had no jurisdiction in this case, yet that it must be admitted, that if the contract be at land for an intended voyage, and the mariners go on board, rigg the ship, &c. though the voyage never proceeds, the Admiralty shall have jurisdiction; but where both the contract and the whole voyage or work is within the body of the county, as it is in the present case with respect to the pilot, the Admiralty has no jurisdiction. *Litt. Rep.* 166. *Arlton's case.* 2 *Brownl. S. C.* *Hob.* 213. 4 *Inst.* 136, &c. *Godbolt* 261. and the cases in 2 *Ld. Raym.* 1044, 5, 6 *Mod.* 238. cited on the other side were relied on for a prohibition, *S. C.* 12 *Mod.* 405.

Curia: We are much inclined to favour the pilot (who is a most necessary mariner) if we could do it without breaking through the rules of law, because it would be for the benefit of trade, and save great expence to these poor men; it is established that every officer and common man who assists in navigating the ship (except the master) even the surgeon is a mariner, and may sue for wages in the court of Admiralty; for the surgeon preserves those who preserve the ship, and whether he is to be paid a gross sum, or so much *per* month, it is the same thing. Though both the contract, and work done on board, in the case of *Wells* and *Osman*, 6 *Mod.* 238. were within the land; yet that case was very rightly determined, because the contract was to manage the ship for an intended voyage, which did not proceed on account of some disagreement among the owners; the mariners were in no fault; and the true reason why seamen may sue for their wages in the Admiralty, though the contract be at land, is, that *there* the ship itself is made liable to them; and besides, *there* they may all join in the suit, neither of which may be at the common law, and yet much for the ease of poor seamen; 6th *Modern* has reported this case very fully, and he is the best reporter who reports fully.

But there is no instance to be found * where the contract was at land, and to do the work on board, within the body of some county; that the common law courts have ever permitted the Admiralty to have jurisdiction; and that is this case, the contract with this pilot was made at land, and to do work within the body of the county, and not at sea, or upon a voyage; and though it is (and must be) laid in the libel that they were both on the high seas, yet we must now take the suggestion to be true, that both the contract and the work were at land. A prohibition was granted *per totam curiam*. Serjeant *Nares* for the plaintiff, Serjeant *Hewitt* for the defendant.

* N. Of all contracts and things done within the bodies of counties as well by land as by water, the admiral's court shall have no jurisdiction. Statute of 15 R. 2. c. 3.

Totterdell and Harris, Masters of the Taylors Company at Bath *versus* Glazby. C. B.

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Where there is a custom to exclude foreigners from exercising a trade in a corporation, and a by law to support the custom, gives a penalty to any but the corporation, it is bad.

N. B. Except in London to the Chamberlain.

5 Rep. 63.
Hollings v. Hungerford.
Cited in my Reports B. R. Mich. 22 Geo. 2.
2 Ld. Raym. 1129.
Salk 203.
6 Mod. 21.

ACTION of debt for a penalty upon a by-law; the declaration sets out that the city of *Bath* is a corporation, and states the charter and power to make by-laws; that there has been a guild and company of taylors, free of the city, and two masters for the government thereof, and a custom time out of mind in that city, that no person whatever shall exercise the trade of a taylor within that city, unless he be free of the said trade and city; and that a by-law has been made by the mayor, aldermen and commons of the city of *Bath*, for the better preserving the said custom which gives a penalty of 3s. 4d. per day, against any one exercising the trade not being free thereof, to be levied by distress, or recovered by action of debt, by the *masters* of the said company for the time being, for the use of the poor of the company of taylors (setting forth the by-law exactly), that the defendant not being a freeman of the said trade or city, exercised the trade of a taylor there; whereby an action accrued to the plaintiff to have and demand, &c. upon *nil debet* there was a verdict for the defendant; and now it was moved that a new trial might be had for misdirection by the judge, and for not receiving evidence which ought to have been received.

Without entring into the question, whether the judge had misdirected the jury, or had refused evidence, which he ought to have received, it was objected, that, upon the face of the record, the by-law is a bad one; and if the plaintiff had a verdict, he could not have judgment, therefore it would be absurd and nugatory to send this matter to be tried again; the objection is, that these taylors are not the corporation of *Bath*, and therefore the by-law is ill in giving the action to the masters of the taylors company for the time being, who are strangers to the corporation of *Bath*; the by-law ought to have given the action to the corporation of *Bath*; for to give it to any body else, is like assigning a *chase in action*, which the policy of the law will not endure. *Co. Lit. 214. a. Bodrick and Fennell, Mich. 22 Geo. 2.* B. R. *Ellington v. Cheney.* 9 Geo. 2. upon this single objection, a new trial was denied by the court.

1. *Mich. 23.*

Michaelmas

Michaelmas Term

6 Geo. 3. 1765.

Fox *versus* Smith. C. B.

DEBT upon a bond to perform an award; the defendant prays *oyer* of the condition, which is, that if the defendant shall perform the award of *John Thompson* (and two other arbitrators named therein) chosen between the parties to determine of and concerning all and all manner of causes, actions, suits, troubles, debts, claims and demands whatsoever, &c. depending between the said parties at any time before the date of the said bond, so as the said award, &c. of the said arbitrators be made in writing, &c. on or before such a day, then, &c. which being read and heard the defendant pleads that the arbitrators made no award between the parties, according to the form and effect of that condition; and this he is ready to verify; wherefore, &c. the plaintiff replies that the arbitrators before the day in the condition for that purpose specified, to wit, on such a day made a certain award in writing under their hands, &c. of and concerning the premisses in the said condition above specified, and by their award ordered and awarded that the defendant should pay to the plaintiff 16 l. 10s. and all such costs, charges and expences as the plaintiff had been put unto in a certain cause then depending between the parties, at a certain day then to come, and that thereupon they should give each other general releases; and then the plaintiff assigns a breach in the non-payment of the said 16 l. 10s. upon which replication the defendant demurred in law. And the counsel for the defendant took several exceptions; 1st, that no certain costs, charges and expences are set down and averred; 2dly, that the award doth not mention any cause between the parties depending in any certain court, and it might be in an inferior court, &c. and 3dly, that there is nothing awarded to the defendant but a release, and that is not to be made until all the rest be performed; and although the award is good for the 16 l. 10s. which is certain, yet the costs, charges and expences of the suit are totally uncertain and void, and the award in that part can never be performed, and so the release to the defendant can never be made, for it is to be made *thereupon*.

Debt upon an arbitration bond. Plea, No award. Replication shews an award to pay 16 l. 10s. and costs &c. Breach assigned for non-payment of the 16 l. 10s. only, good.

Post. Hil. 6. Geo. 3. Addison v. Gray S. P.

3 Lev. 413. and Nott and Long B. R. —9 Geo. 2. 1 Salk. 75.

It

1 Lut. 524.
2 Vent. 242.
Comyns 328.

It was answered by the counsel for the plaintiff, that the breach is well assigned in the replication for non-payment of the 16*l.* 10*s.* only; and in that part the award is good and certain, whether it be void or not as to the costs and charges is not material, for an award may be good in part and bad in part, and the breach is assigned in the non-performance of that part which is good.

Lord Ch. Justice: If the award be good in that part, whereof the breach is assigned, (the defendant having admitted the breach by his demurrer) the plaintiff must have judgment. The 1st objection goes too far, a benign construction of awards hath taken place in modern times though formerly courts of justice looked nicely and critically into them; we will intend that by costs, charges and expences, are meant such costs, &c. as courts take notice of by their officer; it might be said that all costs between the attorney and client, are meant thereby, but we will take the words of the arbitrators to mean the same as if they had been the words of the court. The 2d objection is, that it does not appear in what court the cause was, and it might be in an inferior court, where there may be no proper officer to tax the costs so as to ascertain them to this court; but we will presume the cause was in a superior court, and the rather, because the defendant might have shewn by pleading, that the cause was in an inferior court; as to the 3d objection, a recovery in this action will be a bar to any future action brought on this bond for the non-payment of the costs, &c. after they are ascertained.

Clive Justice: I am of the same opinion.

Bathurst Justice: There is no doubt but an award may be good in part, though bad in part, and if the plaintiff in his replication sets out the award, and assigns a breach in the non-performance of that part which is good, and the defendant demurs, the plaintiff must have judgment, for the whole penalty of the arbitration bond is forfeited by such non-performance; in this case the plaintiff might have applied to the court to have his costs taxed and settled, and then he might have extended the breach to the non-payment thereof also; but if he has judgment now, he can never have those costs, because a recovery in this action, will be a bar to any future action upon the same bond. And I am of opinion the breach is well assigned, and the plaintiff ought to have judgment.

Gould Justice: I have a little doubt whether the plaintiff ought not to have got his costs taxed before the day appointed by the award for the payment thereof, and of the 16*l.* 10*s.* and before he could bring this action; for the defendant is not to have a release until he pays both the debt and costs according to the award. And therefore

therefore I am inclined to think the breach is not well assigned ; and if the plaintiff be not barred of any future action for the costs, he cannot be intitled to judgment.

Lord Ch. Justice ; My brother *Gould's* objection is, that the breach is not well assigned, but if it is well assigned the plaintiff must have judgment for the whole penalty of the bond, and when he has once recovered the whole penalty, he certainly can never have another action upon the same bond to recover the penalty twice over ; that would be unjust, and therefore it is most clear, a recovery in this action will be an eternal bar to any future action on the same bond. Surely it is not necessary to assign breaches of every matter in an award, the breach of any *one*, is a forfeiture of the penalty of the bond ; whether the costs be taxed or not, paid or not, I think the breach in non-payment of the 16 *l.* 10 *s.* is well assigned, and being confessed by the demurrer, the plaintiff must have judgment, (*Gould* justice at last not disagreeing,) judgment was given for the plaintiff.

Catherine How, widow *versus* Edward Strode. C. B.

REPLEVIN for taking the cattle of the plaintiff in a certain place called *Banbury's Furlong*, otherwise *Woolbrook* in the county of *Somerſet*; the defendant avows, and ſays that the place in which, &c. is called *Banbury's Furlong*, and contains five acres and an half, which place is, and at the time when, &c. was the ſoil and freehold of the defendant; and becauſe the cattle at the time when, &c. were in the ſaid place in which, &c. depaſturing on the graſs there then growing, and doing damage to the plaintiff, he well avows the taking of the ſaid cattle *damage feaſant*, &c. the plaintiff pleads in bar to the ſaid avowry, and ſays that the place in which, &c. is and at the time when, &c. was parcel of *Eaſtfield* in the pariſh of *Butleigh* in the ſaid county; and that long before the time when, &c. ſhe was and is ſtill ſeiſed in her demefne, as of ſee of ten acres of land, with the appurtenances in the pariſh of *Butleigh*; and that ſhe and all thoſe whoſe eſtate ſhe hath, &c. from time whereof, &c. have had and uſed, and have been accuſtomed to have and uſe, and ſtill of right ought to have and uſe common of paſture in *Eaſtfield*, whereof, &c. (her and their own lands in the ſame field excepted) for all her and their commonable cattle levant and couchant on the ſaid ten acres of land, every year when the ſame field hath been ſown with any kind of corn or grain, from the time that the corn or grain in that year, growing therein, hath been cut down and carried away, until the ſame field, or ſome part thereof, hath been reſown with ſome kind of corn or grain, as to the ſaid ten acres of land, belonging and appertaining; and further

Replevin.

Avowry that defendant took the cattle damage feaſant.

Plea in bar the place in which, &c. is part of Eaſtfield, that plaintiff is ſeiſed of ten acres of land in B. and claims common of paſture in Eaſtfield when the ſame is ſown with corn, and it is cut and carried away until it be reſown;

PART II.

Z z z

the

and at a proper time put in her cattle.

Replication to the plea in bar, that there are in B. two fields, East and West fields,

and that the owners thereof intercommon while they lay not inclosed

for a certain time.

A custom to inclose.

the plaintiff says, that in the year of our Lord 1764. the said *Eastfield* was sown with corn, and that before the time when, &c. all the corn in that year growing, had been cut down and carried away, wherefore the plaintiff before the time when, &c. the same field, or any part thereof, then or at the time when, &c. not being resown with any kind of corn or grain, put her said cattle into the said piece of land called *Banbury's Furlong*, being part of the said *Eastfield*, to feed on the grafs there, and to take her common there. And the cattle remained there until the defendant of his own wrong took them, &c. wherefore she prays judgment and her damages, &c. the defendant replies to the plea in bar, and says that in the said parish of *Butleigh* there are, and from time immemorial have been two common fields, one called *Eastfield*, and the other *Westfield* and the *Eastfield* is the same *Eastfield* in the plea in bar mentioned whereof, &c. in which common fields the lands of divers persons for the time being now do lie, and from time immemorial have laid disperfedly and in several parcels, and that all and every person and persons, seised in fee of any lands lying in the said common fields respectively, and uninclosed from the rest of such common fields respectively wherein such lands have laid, or do lie, from time whereof, &c. have had and been used and accustomed to have for him, her and themselves, his, her and their farmers and tenants, occupiers of such lands respectively, so lying in such common fields and uninclosed from the rest of such common fields respectively, common of pasture for his, her or their commonable cattle levant and couchant in and upon such his, her or their respective lands, in the said respective common fields, in which his, her or their said lands so respectively lie, as aforesaid, in and throughout all the uninclosed parts of the said common fields respectively (his, her or their own lands in such common fields respectively excepted) in manner following (to wit) in every year, when the said common fields respectively, wherein his, her or their said lands, in such common fields respectively lie, have been sown with any kind of corn or grain, then in every such year, from the time that the corn and grain, growing in such year, in such respective common field, hath been cut down and carried away until such common field, or some part thereof, hath been resown with some kind of corn or grain, in respect of such his, her or their respective lands; and the defendant further says, that the said lands of the plaintiff mentioned in her plea in bar do now lie; and from time whereof, &c. have laid in *Eastfield*, and uninclosed from the rest of the uninclosed lands in *Eastfield*; and the defendant further says, that within the said parish of *Butleigh* there now is, and from time whereof, &c. there hath been an antient custom there used and approved of (that is to say) that every person or persons having any lands in the said common fields, or either of them for the time being, and being willing to inclose the same, or any part thereof, from the rest of such common fields respectively, have respectively from time to time inclo-

sed,

sed, and have been used and accustomed to inclose, and of right ought to have inclosed, and still of right ought to inclose such his, her or their respective lands in such respective common fields, or any part thereof, from the rest of such respective common fields, and in such case, during all the time aforesaid, from the time of such respective inclosures, have had and held, and have used and been accustomed to have and hold, and of right ought to have had and held and still of right ought to have and hold such his, her or their respective lands so inclosed as aforesaid, free and discharged from any common of pasture of any other person whatsoever therein, and that in such case by the custom aforesaid, every person and persons so inclosing as aforesaid, hath and have during all the time aforesaid, thereby from the time of such respective inclosures freed and discharged, and have been used and accustomed to free and discharge, and of right to have freed and discharged, and still of right ought to free and discharge of the rest of the uninclosed lands in the said common fields, or either of them, in which he, she or they were intitled to common as aforesaid, from all and all manner of common of pasture, in respect of such lands so by him, her or them inclosed as aforesaid; and the said defendant further says, that he long before the said time of the said taking, &c. to wit, on the first day of *October* in the year of our Lord 1761. was seised in his demesne as of fee, of and in the said place in which, &c. lying in and parcel of *Eastfield*, and uninclosed from the rest of the said field; and that the said defendant, and all those whose estate he then had in the said place in which, &c. for the time being, from time whereof, &c. had then had, and had been used and accustomed to have, and of right ought to have had for himself and themselves, his and their farmers and tenants, occupiers of the said place in which, &c. common of pasture for all his and their commonable cattle levant and couchant in and upon the said place in which, &c. in and throughout the then uninclosed parts of *Eastfield* (his and their own lands in such common field excepted) in manner following (that is to say) in every year when the said *Eastfield* hath been sown with any kind of corn or grain, then in every such year from the time that the corn and grain growing in such respective year in such common field called the *Eastfield*, hath been cut down and carried away until the same field, or some part thereof, hath been resown with some kind of corn or grain, in respect of the said place in which, &c. and being so seised thereof, he the defendant afterwards and before the time when, &c. to wit, on the same day and year last aforesaid, at the parish aforesaid, did inclose, the said place in which, &c. from the rest of the said field called *Eastfield*, according to, and by force of the said custom, and hath kept and continued ever since, and still keeps and continues the same so inclosed from the rest of the same common field, whereby according

and that such inclosure is freed from common of any other person, and that the person so inclosing thereby frees and discharges all the uninclosed from all common in respect to such land inclosed.

That he inclosed the place in which, &c. to which he had a right of common before,

whereby all
the uninclosed
lands were
freed from his
said right of
common,

and that the
place inclosed
ought to be
free from
common of
any other per-
son.

Plaintiff re-
joins that she
put in the
cattle till
defendant
took them of
his own
wrong,

and traverses
the custom to
inclose, &c.

ing to, and by force of the said custom, all common of pasture of every person whatsoever, in respect or right of any land lying in the *Eastfield*, and all right of common of pasture of the said defendant, in all and every the then uninclosed lands in the said field in right of the said place in which, &c. from thence wholly ceased and was determined, and of right ought to have ceased and be determined, and still of right ought to cease and be determined; and the said defendant from the time of the said inclosure hitherto ought to have had and held, and of right ought to have had and held, and still of right ought to have and hold the said place in which, &c. freed and discharged from any common of pasture of any other person whatsoever; and the said defendant further says, that the said cattle, long after such inclosure was so made as aforesaid, and during the time that the said place in which, &c. so was and continued so inclosed from the rest of the said common field called the *Eastfield* as aforesaid, to wit, at the said time when, &c. were of the said plaintiff's own wrong in the said place in which, &c. feeding and depasturing on the grass there then growing, and doing damage there to the defendant, in manner and form as he hath above in his avowry alledged; and this he is ready to verify; wherefore he prays judgment and a return of the said cattle, together with his damages, costs and charges, &c. according to the form of the statute in such case made and provided, to be adjudged to him, &c. the plaintiff rejoins and says, that she having such right of common in the *Eastfield* whereof, &c. as in her plea in bar is set forth, she at the said time and in such manner as in her plea in that behalf mentioned, put her cattle into the said piece of land called *Banbury's Furlong*, being part of the said *Eastfield*, to feed on the grass there growing, and to take her said common there, and the same cattle remained there for the cause aforesaid, until the defendant at the time when, &c. of his own wrong took her said cattle and unjustly detained them, against sureties and pledges in manner and form as the said plaintiff hath in her plea in bar in that behalf alledged; *without this*, that within the parish of *Butleigh*, there now is and from time whereof, &c. there hath been an antient custom there used and approved of, that every person or persons having any lands in the said common fields, or either of them for the time being, and being willing to inclose the same, or any part thereof, from the rest of the said common fields respectively, have respectively from time to time inclosed, and have been used and accustomed to inclose, and of right ought to have inclosed, and still of right ought to inclose such his, her or their respective lands in such respective common fields, or any part thereof, from the rest of such respective common fields, and in such case during all the time aforesaid from the time of such respective inclosures have had and held, and have used and been accustomed to have and hold, and of right ought to have had and held, and still of right ought to have and hold such his,

his, her or their respective lands so inclosed as aforesaid, free and discharged from any common of pasture of any other person whatsoever therein, and that in such case by the custom aforesaid, every person and persons so inclosing as aforesaid, hath and have during all the time aforesaid, thereby from the time of such respective inclosures freed and discharged, and have been used and accustomed to free and discharge, and of right ought to have freed and discharged, and still of right ought to free and discharge all the rest of the uninclosed lands in the said common fields, or either of them, in which he, she, or they were intitled to common as aforesaid, from all and all manner of common of pasture, in respect of such lands so by him, her or them, inclosed as aforesaid, as the said defendant in his replication to the said plea in bar of the plaintiff hath above alledged; and this the plaintiff is ready to verify; wherefore, as before, she prays judgment and her damages by reason of the taking and unjustly detaining her said cattle, to be adjudged to her, &c. the defendant surrejoins, and as before says, that within the parish of *Butleigh* there now is, and from time whereof, &c. there hath been an antient custom, &c. (and so takes issue upon the traverse) as the said defendant hath in his said replication to the said plea in bar of the said plaintiff above alledged; and of this he puts himself upon the country, and the said plaintiff doth so likewise; therefore, &c.

The defendant surrejoins, and takes issue on the traverse.

This cause was tried at the last assizes for the county of *Somerset*, the issue lying upon the defendant to prove the custom; it was reported by the judge that the defendant produced five very old deeds, and several other deeds which *proved the custom to inclose*, he also called seven old witnesses, three of the oldest proved the custom to inclose of their own knowledge for a great number of years, and that they had been told (when they were young) by very old persons then living, that it was the custom for the landowners in these fields to inclose, and said that they thought any man might inclose his land. As to the right of common whilst the lands laid uninclosed, some of the witnesses said that such owners of the uninclosed lands had a right of common without stint, *but that after any of them had inclosed his land, such person had no right of common at all in the said fields, or either of them.* Another witness said, if a man inclosed all his lands in the fields, he lost his right of common totally; but that if he left any bit, only an acre uninclosed, he used to enjoy his common in regard to that acre uninclosed, just as before, and used to put in any number of cattle without stint; several other old witnesses swore to the same effect, and here the defendants rested their case; whereupon the judge was of opinion that the defendant had not proved the custom, which he said was intire, that several of the witnesses had proved that if a man inclosed 19 acres out of 20, it was the custom for him in respect to the one acre not inclosed, to put

New trial for misdirection of the judge upon the evidence given for the defendant at the trial.

on to the uninclosed lands as many cattle as he pleased *without stint* and as he had done before he inclosed the 19 acres, and therefore the judge was pleased to tell the jury that he thought the defendant had not proved the custom *intirely*, and that if they believed the land inclosed in question, was discharged and freed from any person having a right of common thereon, they should find for the defendant, if not, that they should find for the plaintiff, whereupon the jury gave a verdict for the plaintiff.

It was now moved for a new trial, for the misdirection of the Judge; 1st, for that the custom to inclose was fully and clearly proved; and 2dly, that the right of common before inclosure made, was for cattle *levant and couchant* upon each person's uninclosed lands; and this matter is not at all in issue, but is admitted on the pleadings by both sides; the right of inclosure with its consequence *viz.* its being freed from any person's former right of common thereon, was the only matter in issue, the other was a legal consequence and not traversable (to wit) that the owner of such inclosed land is barred of any future right to common on the uninclosed land in these fields, and what some of the witnesses said of common *without stint* is nothing to the purpose, for there is no such thing as common *without stint* belonging to land; common belonging to land can only be for cattle *levant and couchant* thereon; that the custom to inclose was clearly proved, as appears by the evidence before stated, and when the land is inclosed, it is freed and discharged from any person's former right of common thereon; and of this opinion was the whole court, and said 1st, that the parties agree by the pleadings that while the lands in these open fields are uninclosed, all have a right of common for cattle *levant and couchant*; 2dly, the custom to inclose, and that the land, as soon as and while inclosed, is free from common is fully proved; the 3d matter is a consequence in law, and wanted no proof, *viz.* that as soon as any person has inclosed he has excluded himself from any right of common on any of the uninclosed lands; and any judgment given upon this record cannot be a bar to any other party who may claim common in these fields *without levancy and couchancy*. *Per totam curiam*, The verdict must be set aside for misdirection of the judge, and there must be a new trial.

John

John Entick clerk *versus* Nathan Carrington and three others, Messengers in ordinary to the King. C. B.

1762.100

IN trespass; the plaintiff declares that the defendants on the 11th day of *November* in the year of our Lord 1762, at *Westminster* in *Middlesex*, with force and arms broke and entred the dwelling house of the plaintiff in the parish of *St. Dunstan Stepney*, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chests, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pried into and examined all the private papers, books, &c. of the plaintiff there found whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &c. &c. of the plaintiff there found, and other 100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2000*l*. The defendants plead 1st, Not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entring the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, &c. of the plaintiff in his house, and the searching and examining all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and reading over, prying into, and examining the private papers, books, &c. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them because they say that before the supposed trespass, on the 6th of *November* 1762. and before, until, and all the time of the supposed trespass, the Earl of *Halifax* was, and yet is one of the Lords of the Kings Privy Council, and one of his principal secretaries of state, and that the Earl before the trespass on the 6th of *November* 1762. made his warrant under his hand and seal directed to the defendants, by which the Earl did in the King's name authorize and require the defendants, *taking a constable to their assistance*, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intituled, the Monitor or British Freeholder, number 357, 358, 360, 373, 376, 378 and 380, *London*, printed for

Trespass for breaking and entring plaintiff's house, &c.

Special justification under a warrant of the secretary of state.

J.

J. Wilson and *J. Fell* in *Pater Noster Row*, containing gross and scandalous reflections and invectives upon his Majesty's government, and upon both houses of parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody before the Earl of *Halifax* to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other his Majesty's officers civil and military, and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion; and the defendants further say, that afterwards and before the trespass on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year in the declaration, in the day time about 11 o'clock, being the said time when, &c. by virtue and for the execution of the said warrant entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the Earl of *Halifax*, according to the warrant, and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said Earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at *Westminster*, where the said Earl then and long before transacted the business of his office, and delivered the same to *Lovel Stanhope Esq*; who then was and yet is an assistant to the Earl in his office of secretary of state, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards (to wit) on the 17th of *November* in the said year was discharged out of their custody, and in searching for the books and papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff in the declaration mentioned then found in his house, and because at the said time when, &c. the said doors in the said house leading to the rooms therein, and the said boxes, chests, &c. were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little damage

damage to the plaintiff as they possibly could, which are the same breaking and entring the house of the plaintiff, &c. (and so repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, &c. wherefore they pray judgment, &c. the plaintiff replies to the plea of justification above, that (as to the trespass thereby covered) he by any thing alledged by the defendants therein ought not to be barred from having his action against them, because he says, that the defendants at the parish of *Stepney*, of *their own wrong*, and without the cause by them in that plea alledged, broke and entered the house of the plaintiff, &c. &c. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do so likewise. There is another plea of justification like the first, with this difference only, that in the last plea it is alledged, the plaintiff and his papers, &c. were carried before Lord *Halifax*, but in the first, it is before *Lovel Stanhope*, his assistant or law clerk; and the like replication of *de injuria sua propria absq; tali causa*, whereupon a third issue is joined. This cause was tried in *Westminster-hall* before the Lord Chief Justice, when the jury found a special verdict to the following purport.

Replication de injuria sua propria.

The jurors upon their oath say, as to the issue first joined (upon the plea of Not guilty to the whole trespass in the declaration) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. above (excepted) the jurors on their oath say, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the Earl of *Halifax* was, and still is one of the Lords of the King's privy council, and one of his principal secretaries of state, and that before the time in the declaration, viz. on the 11th of October 1762. at *Saint James's Westminster*, one *Jonathan Scott* of London, bookseller and publisher, came before *Edward Weston*, Esq; an assistant to the said Earl, and a justice of peace for the city and liberty of *Westminster*, and there made and gave information in writing to and before the said *Edward Weston* against the said *John Entick* and others, the tenor of which information now produced and given in evidence to the jurors followeth in these words and figures, to wit, "The voluntary information of *J. Scott*; In the year 1765. I proposed setting up a paper, and mentioned it to

Special verdict.

Scott's information before a justice of peace.

PART II.

4 B

Doctor

“ *Doctor Shebbeare*, and in a few days one *Arthur Beardmore* an
 “ attorney at law sent for me, hearing of my intention, and desired
 “ I would mention it to *Dr. Shebbeare*, that he *Beardmore* and some
 “ others of his friends had an intention of setting up a paper in
 “ the city; *Shebbeare* met *Beardmore*, and myself and *Entick* (the
 “ plaintiff) at the *Horn* tavern, and agreed upon the setting up the
 “ paper by the name of the *Monitor*, and that *Dr. Shebbeare* and
 “ *Mr. Entick* should have 200*l.* a year each; *Dr. Shebbeare* put
 “ into *Beardmore*’s and *Entick*’s hands some papers, but before the
 “ papers appeared *Beardmore* sent them back to me (*Scott*), *Sheb-*
 “ *beare* insisted on having the proportion of his salary paid him;
 “ he had 50*l.* which I (*Scott*) fetched from *Vere* and *Asgills* by their
 “ note, which *Beardmore* gave him; *Dr. Shebbeare* upon this was
 “ quite left out, and the monies have been continued to *Beard-*
 “ *more* and *Entick* ever since, by subscription, as I supposed, raised,
 “ I know not by whom; it has been continued in these hands ever
 “ since; *Shebbeare*, *Beardmore* and *Entick* all told me that the late
 “ *Alderman Beckford* countenanced the paper; they agreed with
 “ me that the profits of the paper, paying all charges belonging to
 “ it, should be allowed me; in the paper of the 22 *May*, called
 “ *Sejanus*; I apprehend the character of *Sejanus* meant *Lord Bute*,
 “ the original manuscript was in the hand-writing of *David Me-*
 “ *redith*, *Mr. Beardmore*’s clerk; I before received the manuscript
 “ for several years till very lately from the said hands, and do be-
 “ lieve that they continue still to write it. *Jona. Scott, S. James*’s
 “ 11th October 1762.

The above information was given voluntarily before me, and signed in my presence by *Jona. Scott. J. Weston.*

And the jurors further say, that on the 6th of *November* 1762, the said information was shewn to the Earl of *H.* and thereupon the Earl did then make and issue his warrant directed to the defendants, then and still being the King’s messengers, and duly sworn to that office, for apprehending the plaintiff, &c. the tenor of which warrant produced in evidence to the jurors, follows in these

The secretary words and figures: “ *George Montagu Dunk*, Earl of *Halifax*,
 of state’s war- “ *Viscount Sunbury*, and Baron *Halifax*, one of the Lords of his
 rant to seize “ Majesty’s honourable privy council, lieutenant General of his
 plaintiff and “ Majesty’s forces, Lord lieutenant general and general governor of
 his books and “ the kingdom of *Ireland*, and principal secretary of state, &c.
 papers “ These are in his Majesty’s name to authorize and require you, ta-
 “ king a constable to your assistance, to make strict and diligent search
 “ for *John Entick*, the author, or one concerned in the writing of
 “ several weekly very seditious papers, intitled the *Monitor*, or *Brit-*
 “ *ish Freeholder*, No. 357, 358, 360, 373, 376, 378, 379, and 380.
 “ *London* printed for *J. Wilson* and *J. Fell* in *Pater Noster Row*, which
 “ contain gross and scandalous reflections and invectives upon his Ma-
 “ jesty’s

“ jesty’s government, and upon both houses of parliament, and him,
 “ having found, you are to seize and apprehend, and to bring, to-
 “ gether with his books and papers, in safe custody before me to
 “ be examined concerning the premisses, and further dealt with
 “ according to law, in the due execution whereof all mayors, she-
 “ riffs, justices of the peace, constables, and other his Majesty’s
 “ officers civil and military, and loving subjects whom it may con-
 “ cern, are to be aiding and assisting to you as there shall be occa-
 “ sion; and for so doing this shall be your warrant, given at *Saint*
 “ *James’s* the 6th day of *November* 1762. in the third year of his
 “ Majesty’s reign. *Dunk Halifax*: to *Nathan Carrington*, *James*
 “ *Watson*, *Thomas Ardran* and *Robert Blackmore*, four of his Ma-
 “ jesty’s messengers in ordinary.” And the jurors further say, the
 Earl caused this warrant to be delivered to the defendants to be ex-
 ecuted, and that the defendants afterwards on the 11th of *November*
 1762, at 11 o’clock in the day time, by virtue and for the execu-
 tion of the warrant, *but without any constable taken by them to their*
assistance, entered the house of the plaintiff, the outer door thereof
 being open, and the plaintiff being therein, to search for and seize
 the plaintiff and his books and papers, in order to bring him and
 them before the Earl, according to the warrant; and the defendants
 did then find the plaintiff there, and did seize and apprehend him,
 and did there search for his books and papers in several rooms and
 in the house, and in one bureau, one writing desk, and several
 drawers of the plaintiff there in order to find and seize the same,
 and bring them along with the plaintiff before the Earl according
 to the warrant, and did then find and seize there some of the books
 and papers of the plaintiff, and perused and read over several other
 of his papers which they found in the house, and chose to read, and
 that they necessarily continued there in the execution of the war-
 rant four hours, and disturbed the plaintiff in his house, and then
 took him and his said books and papers from thence, and forthwith
 gave notice at the office of the said secretary of state in *Westminster*
 unto *Lovel Stanhope*, Esq; then before, and still being an assistant to
 the Earl in the examinations of persons, books and papers seized by vir-
 tue of warrants issued by secretaries of state, and also then and still
 being a justice of peace for the city and liberty of *Westminster* and
 county of *Middlesex*, of their having seized the plaintiff, his books
 and papers, and of their having them ready to be examined, and
 they then and there at the instance of the said *Lovel Stanhope* de-
 livered the said books and papers to him: and the jurors further
 say, that, on the 13th of *April* in the first year of the King, his
 Majesty, by his letters patent under the great seal, gave and granted
 to the said *Lovel Stanhope* the office of law-clerk to the secreta-
 ries of state; and the King did thereby ordain, constitute and appoint
 the law-clerk to attend the offices of his secretaries of state, in
 order to take the depositions of all such persons whom it may be
 necessary

delivered to
the defendants
to be execu-
red, who on
11th of Nov.
1762. did
execute the
same without
a constable,

and carried
the books,
&c. to *Lovel*
Stanhope, the
law clerk,
who is ap-
pointed to
that office by
the King’s
letters patent,
and is a justice
of peace.

neccessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk in *hæc verba*) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that *Lovel Stanhope*, by virtue of the said letters patent long before the time when, &c. on the 13th of *April* in the first year of the King was, and ever since hath been and still is law-clerk to the King's secretaries of state, and hath executed that office all that time. And the jurors further say, that at different times from the time of the revolution to this present time, the like warrants with *that* issued against the plaintiff, have been frequently granted by the secretaries of state, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the King, &c. in the place of a messenger in ordinary, &c. and the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the perusal and copy of the said warrant, so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, he said defendants are guilty of the trespass herein before particularly specified in *breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing desk, and several drawers of the plaintiff in his house and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found*; or the said plaintiff ought to maintain his said action against them, the jurors are altogether ignorant, and pray the advice of the court thereupon; and if upon the whole matter aforesaid by the jurors found, it shall seem to the court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them, the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out to 300*l.* and for those costs and charges, to 40*s.* but if upon the whole matter by the jurors found, it shall seem to the court that the said defendants are not guilty of the said trespass; or that the plaintiff ought not maintain his action against them, then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and as to the last issue

That the like warrants have issued since the revolution.

That no demand was made by plaintiff of a copy of the warrant, nor did plaintiff bring his action within six months after the facts done by defendants.

Special verdict concludes in the common form.

Damages 300*l.*

on the second special justification the jury found for the plaintiff, that the defendants in their own wrong broke and entred, and did the trespass as the plaintiff in his replication has alledged.

The last issue found for plaintiff.

This special verdict was twice solemnly argued at the bar; in *Easter* term last by serjeant *Leigh* for the plaintiff, and *Burland*, one of the King's serjeants, for the defendants, and in this present term by serjeant *Glynn* for the plaintiff, and *Nares*, one of the King's serjeants for the defendants.

Counsel for the plaintiff. At the trial of this cause the defendants relied upon two defences; 1st, That a secretary of state as a justice or conservator of the peace, and these messengers acting under his warrant are within the statute of the 24th of *Geo. 2. c. 44.* which enacts, (among other things) That "no action shall be brought against any constable or other officer, or any person acting by his order and in his aid, for any thing done in obedience to the warrant of a justice, until demand hath been made or left at the usual place of his abode by the party, or by his attorney in writing signed by the party, demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand", and that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against the defendants, who are merely ministerial officers acting under the secretary of state, who is a justice and conservator of the peace. 2dly, That the warrant under which the defendants acted, is a legal warrant, and that they well can justify what they have done by virtue thereof, for that at many different times from the time of the revolution till this time, the like warrants with that issued against the plaintiff in this case have been granted by secretaries of state, and executed by the messengers in ordinary for the time being.

Easter term
5 *Geo. 3.*

1. It is most clear and manifest upon this verdict, that the Earl of *Halifax* acted as secretary of state when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute 24 *Geo. 2. c. 44.* neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever, that ranks a secretary of state *quasi* secretary, among the conservators of the peace; *Lambert, Coke, Hawkins, Ld. Hale, &c. &c.* none of them take any notice of a secretary of state being a conservator of the peace, and until of late days he was no more indeed than a mere clerk; a conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute, a justice of peace, constable, headborough and other officers of the peace, borougholders

As to the first.

and tithingmen, as well as secretary of state, conservator of the peace, and messenger in ordinary, were all very well known; and if it had been the intent of the statute, that a secretary of state, conservator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them, and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter, and Lord *Halifax's* footmen might as well be said to be officers within the statute as these defendants. Besides the verdict finds that these defendants executed the warrant *without taking a constable to their assistance*; this disobedience will not only take them out of the protection of the statute, (if they had been within it), but will also disable them to justify what they have done, by any plea whatever; the office of these defendants is a place of considerable profit, and as unlike that of a constable or tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to assist him. 1 *Hale's P. C.* 581. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to constables and other public officers which the law takes notice of, 2 *Hale's P. C.* 149, 150. how much more necessary in the present case was it to take a constable to the defendants assistance; the defendants have also disobeyed the warrant in another matter, being commanded to bring the plaintiff, and his books and papers before Lord *Halifax*; they carried him and them before *Lovel Stanhope*, the law-clerk, and though he is a justice of peace, that avails nothing, for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to *Ld. Halifax*. The information was made before justice *Weston*; the secretary of state in this case never saw the accuser nor the accused; it seems to have been below his dignity; the names of the officers introduced here are not to be found in the law-books, from the first year-book to the present time.

4 Inst. 176.

As to the second.

2. A power to issue such a warrant as this, is contrary to the genius of the law of *England*, and even if they had found what they searched for, they could not have justified under it; but they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant, so that it now appears that this enormous trespass and violent proceeding has been done upon meer surmise; but the verdict says such warrants have been granted by secretaries of state ever since the revolution; if they have, it is high time to put an end to them, for if they are held to be legal, the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime,

no

no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the *Spanish* inquisition; for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before Lord *Halifax*; What? has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business? this would be monstrous indeed! and if it were lawful, no man could endure to live in this country. In the case of a search warrant for stolen goods, it is never granted, but upon the strongest evidence, that a felony has been committed, and that the goods are secreted in such a house, and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers: however frequently these warrants have been granted since the revolution, that will not make them lawful, for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good; even customs which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the common wealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. *Davis* 32. b. These warrants are not by custom, they go no farther back than 80 years, and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's Bench since that time; but it was reserved for the honour of this court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-Chamber tyranny.

Counsel for the defendants: I am not at all alarmed, if this power is established to be in the secretaries of state; it has been used in the best of times, often since the revolution. I shall argue, 1st, That the secretary of state has power to grant these warrants, and if I cannot maintain this, I must 2dly shew that by the statute 24 Geo. 2. c. 24. this action does not lie against the defendants the messengers. 1. A secretary of state has the same power to commit for treason as a justice of peace. *Kendale and Roe, Skin.* 596. 1 *Salk.* 346. S. C. 1 *Ld. Raym.* 65. 5 *Mod.* 78. S. C. Sir *Wm. Wyndham* was committed by *James Stanhope*, secretary of state, to the Tower for high treason the 7th of October 1715. see the case 1 *Stra.* 2. and serjeant *Hawkins* says it is certain that the privy council or any one or two of them, or a secretary of state, may lawfully commit persons for treason, and for other offences against the state, as in all ages they

they have done, 2 Hawk. P. C. 117. sect. 4. 1 Leon. 70, 71. Carth. 291. 2 Leon. 175. if it is clear that a secretary of state may commit for treason and other offences against the state, he certainly may commit for a seditious libel against the government, for there can hardly be a greater offence against the state, except actual treason. A secretary of state is within the *habeas corpus* act, but a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing, so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and it's author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constable and officers assisting him in the search, may break open doors, boxes, &c. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular cases, yet to let such libellers escape who endeavour to raise rebellion is a greater evil, and may be compared to the reasoning of Mr. Justice Foster in the case of pressing 159. "where he says, that war is a great evil, but it is chosen " to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but is it a maxim in law and good policy too, that all private mischiefs must be born with patience, " for preventing a national calamity, &c.

1. Supposing there is a defect of jurisdiction in the secretary of state, yet the defendants are within the *Stat. 24 Geo. 2. c. 44.* and though not within the words, yet they are within the reason of it; that it is not unusual in acts of parliament to comprehend by construction a generality where express mention is made only of a particular; the statute of *Circumspecte agatis* concerning the bishop of Norwich extends to all bishops. *Fitz. Prohibition 3.* and 2 *Inst.* on this statute. 25 *Ed. 3. c.* enables the incumbent to plead in *quare impedit*, to the King's suit; this also extends to the suits of all persons. 38 *E. 3. 31.* the act 1 *Ric. 2.* ordains that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this act extends to all gaolers. *Plowd. Com. case of Platt 35. b.* the *stat. de denis conditionalibus* extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other statutes. *Tko. Jones 62.* the *stat. 7 Jac. 1. c. 5.* the word *constable* therein extends to a deputy constable. *Moor 845.* These messengers in ordinary have always been considered as officers of the secretaries of state, and a commitment may be to their custody, as in Sir W. Wyndham's case. A justice of peace may make a constable *pro hac vice* to execute a warrant, who would be within the *stat. 24 Geo. 2.* so if these defendants are not constables, yet as

officers they have power to execute a warrant of a justice of peace; a constable may, but cannot be compelled to execute a warrant out of his jurisdiction; officers acting under colour of office, though doing an illegal act, are within this statute. *Vaugh.* 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said that a conservator of the peace had no more power than a constable has now, I answer, they had power to bind over at common law, but a constable has not. *Dalton cap.* 1.

Counsel for the plaintiff in reply: It is said this has been done in the best of times ever since the revolution; the conclusion from thence is, that it is the more inexcusable, because done in the best of times, in an æra when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the secretary of state hath power to commit for treason and other offences against the state, but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs; but it is said if the secretary of state has power to commit, he has power to search, &c. as in the case of stolen goods; this is a false consequence, and it might as well be said he has a power to torture; as to stolen goods if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the state; but that is only the argument and opinion of a single judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful (without an act of parliament) since the time of the revolution. The *stat.* 24 *Geo.* 2. has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the statute of 24 *Geo.* 2. but the law knows no such officers as messengers in ordinary to the King. It is said the *habeas corpus* act extends to commitments by secretaries of state though they are not mentioned therein; true, but that statute was made to protect the innocent against illegal and arbitrary power; it is said the secretary of state is a justice of peace, and the messengers are his officers; why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? it seems to admit they were not the proper officers; if a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him; but a constable or other known officer in the law need not shew his warrant.

Easter term
5 Geo. 3.

Lord Chief Justice: I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again; I shall only just mention a matter which has slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, are within the *stat. 24 Geo. 2. c. 44.* To put one case (among an hundred that might happen): Suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize all the books and papers of the owner's of the house, whether in such a case would the justice of peace, his officers or servants, be within the *stat. 24 Geo. 2.?* I desire that every point of this case may be argued to the bottom, for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

Mich. 6 Geo.
3.

Counsel for the plaintiff on the 2d argument: If the secretary of state, or a privy counsellor, justice of peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power, can never be construed to be within the meaning or reason of the statute of *24 Geo. 2. c. 44.* which was made to protect justices of peace, &c. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a secretary of state, or a privy counsellor, had ever existed, it would appear from our law-books; all the ancient books are silent on this head; *Lambert* never once mentions a secretary of state; neither he nor a privy counsellor, were ever considered as magistrates; in all the arguments touching the Star-chamber, and petition of right, nothing of this power was ever dream't of; state commitments anciently were either *per mandatum regis* in person, or by warrant of several of the privy counsellors in the plural number; the King has this power in a particular mode, *viz.* by the advice of his privy council, who are to be answerable to the people if wrong is done, he has no other way but in council to signify his mandate. In the case of the seven bishops, this matter was insisted upon at the bar, when the court presumed the commitment of them was by advice of the privy council, but that a single privy counsellor had this power was not contended for by the crown-lawyers then. This court will require it to be shewn that there have been ancient commitments of this sort; neither the secretary of state, or a privy counsellor, ever claimed a right to administer an oath, (but they employ a person as a law-clerk, who is a justice of peace, to administer oaths,

oaths, and take recognizances) Sir Barth. Shower in *Kendale* and *Roe's* case, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party; therefore whoever has power to commit has power to bail; it was a question formerly, whether a constable as an ancient conservator of the peace could take a recognizance or bond; in the time of *Q. Eliz.* there was a case wherein some of the judges were of one opinion and some of another. A secretary of state was so inconsiderable formerly, that he is not mentioned in the statute of *scandalum magnatum*; his office was thought of no great importance, he takes no oath of office as secretary of state, gives no kind of security for the exercise of such judicial power as he now usurps; if this was an ancient power it must have been annexed to his office anciently, it cannot be now given to him by the King; the King cannot make two chief justices of the common pleas; nor could the King put the great seal in commission before an act of parliament was made for that purpose; there was only one secretary of state formerly, there are now two appointed by the King; if they have this power of magistracy, it should seem to require some law to be made to give that power to two secretaries of state which was formerly in one only; as to commitments *per mandatum regis*, see *Stamf. Pl. Coron.* 72. 4 *Inst. c.* 5. court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor; it is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by *Walsingham* secretary of state, 1 *Leon.* 71. it was returned on the *habeas corpus* at last, that the party was committed *ex sententia & mandato totius concilii privati dominæ reginæ*; because he found he had not that power of himself, he had recourse to the whole privy council's power, so that this case is rather for the plaintiff. Commitment by the high commission court of *York* was declared by parliament illegal from the beginning; so in the case of ship-money the parliament declared it illegal.

Counsel for the defendants on the 2d argument: The most able judges and advocates ever since the revolution, seem to have agreed that the secretaries of state have this power to commit for a misdemeanor. Secretaries of state have been looked upon in a very high light for 200 years past. 27 *H. 8. c.* 11. their rank and place is settled by 31 *Hen. 8. c.* 10. 4 *Inst.* 362. cap. 77. of precedency. 4 *Inst.* 56. *Selden's Title. of Honour C. Officers of State*; so that a secretary of state is something more than a mere clerk, as was said. *Minsheu verb. Secretary*; he is *et secretioribus consiliis domini regis*. Serjeant *Pengelly* moved that Sir *Wm. Wyndham* might be bailed; if he could not be committed by the secretary of state for something

thing less than treason, why did he move to have him bailed? this seems a concession that he might be committed in that case for something less than treason; Lord *Holt* seems to agree that a commitment by a secretary of state is good. *Skin.* 598. 1 *Ld. Raym.* 65. There is no case in the books that says in what cases a secretary of state can or can not commit; by what power is it that he can commit in the case of treason, and in no other case? The resolution of the house of commons touching the petition of right, *Selden* last volume, *Parliamentary History*, vol. 8. fol. 95, 96. secretary *Coke* told the lords, it was his duty to commit by the King's command. *Toxley's case*, *Carth.* 291. he was committed by the secretary of state on the statute of *Eliz.* for refusing to answer whether he was a Romish priest; *The queen and Derby*, *Fortescue's Rep.* . the commitment was by a secretary of state *Mich.* 10 *Anna* for a libel, and held good. (*N. Bathurst J.* said he had seen the *habeas corpus* and the return, and that this was a commitment by a secretary of state). *The King and Earbury*, *Mich.* 7 *Geo.* 2. 2 *Bernard* 346. was a motion to discharge a recognizance entred into for writing a paper called the *Royal Oak*; Lord *Hardwicke* said it was settled in *Kendale* and *Roe's case*, that a secretary of state might apprehend persons suspected of treasonable practices; and there are a great number of precedents in the crown-office of commitments by secretaries of state for libels against the government. After time taken to consider, the whole court gave judgment this term for the plaintiff.

Curia: The defendants make two defences; first, That they are within the *stat.* 24 *Geo.* 2. c. 44. 2dly, That such warrants have frequently been granted by secretaries of state ever since the revolution, and have never been controverted, and that they are legal; upon both which defences the defendants rely.

A secretary of state, who is a privy counsellor, if he be a conservator of the peace, whatever power he has to commit is by the common law; if he be considered only as a privy counsellor, he is the only one at the board who has exercised this authority of late years; if as a conservator, he never binds to the peace; no other conservator ever did that we can find; he has no power to administer an oath, or take bail; but yet it must be admitted that he is in the full exercise of this power to commit, for treason and seditious libels against the government, whatever was the original source of that power; as appears from the cases of the *Queen and Derby*, *The King and Earbury*, and *Kendale and Roe's case*.

We must know what a secretary of state is, before we can tell whether he within the *stat.* 24 *Geo.* 2. c. 44, he is the keeper of the King's signet wherewith the King's private letters are signed.
2 *Inst.*

2 *Inl.* 556. *Coke upon Articuli super chartas*, 28 Ed. 1. Lord Coke's silence is a strong presumption that no such power as he now exercises was in him at that time; formerly he was not a privy counsellor, or considered as a magistrate; he began to be significant about the time of the revolution, and grew great when the Princes of Europe sent ambassadors hither; it seems inconsistent that a secretary of state should have power to commit, and no power to administer an oath, or take bail; who can commit and not have power to examine? the house of commons indeed commit without oath, but that is nothing to the present case; there is no account in our law-books of secretaries of state, except in the few cases mentioned; he is not to be found among the old conservators; in *Lambert*, *Crompton*, *Fitzbertbert*, &c. &c. nor is a privy counsellor to be found among our old books till *Kendall* and *Roe's* case, and 1 *Leon.* 70, 71. 29 *Eliz.* is the first case that takes notice of a commitment by a secretary of state; but in 2 *Leon.* 175. the judges knew no such committing magistrate as the secretary of state. It appears by the petition of right, that the King and council claimed a power to commit; if the secretary of state had claimed any such power, ~~then~~ certainly the petition of right would have taken notice of it; but from its silence on that head we may fairly conclude he neither claimed or had any such power; the *stat.* 16 *Car.* 1. for regulating the privy council, and taking away the court of Star-Chamber, binds the King not to commit, and in such case gives a *habeas corpus*; it is strange that house of commons should take no notice of the secretary of state, if he then had claimed power to commit. This power of a secretary of state to commit was derivative from the commitment *per mandatum regis: Ephemeris parlamentaria*. Coke says in his speech to the house, "If I do my duty to the King, I must commit without shewing the cause"; 1 *Leon.* 70, 71. shews that a commitment by a single privy counsellor was not warranted. By the licensing statute of 13 & 14 *Car.* 2. cap. 33. sec. 15. licence is given to a messenger under a warrant of the secretary of state to search for books unlicensed, and if they find any against the religion of the church of England, to bring them before the secretary of state; the warrant in that case expressed that it was by the King's command. See *Stamford's* comment on the mandate of the King, and *Lambert, Cap. Bailment*. All the judges *temp. Eliz.* held that in a warrant or commitment by one privy counsellor he must shew it was by the mandate of the King in council. See *And.* 297. the opinion of all the judges; they remonstrated to the King that no subject ought to be committed by a privy counsellor against the law of the realm. Before the 3 *Car.* 1. all the privy counsellors exercised this power to commit; from that era they disused this power, but then they prescribed still to commit *per mandatum regis*. *Journal of the house of commons* 195. 16 *Car.* 1. Coke, Selden, &c. argued that the King's power to commit, meant that he had such

power by his courts of justice. In the case of the seven bishops all the court and King's council admit, that supposing the warrant had been signed out of the council, that it would have been bad, but the court presumed it to be signed at the board; *Pollexfen* in his argument says, we do not deny but the council board have power to commit, but not out of council; this is a very strong authority, the whole body of the law seem not to know that privy counsellors out of council had any power to commit, if there had been any such power they could not have been ignorant of it; and this power was only in cases of high treason, they never claimed it in any other case. It was argued that if a secretary of state hath power to commit in high treason, he hath it in cases of lesser crimes: but this we deny, for if it appears that he hath power to commit in one case only, how can we then without authority say he has that power in other cases? he is not a conservator of the peace; justice *Rokeby* only says he is in the nature of a conservator of the peace: We are now bound by the cases of the *Queen and Derby*, and *The King and Earbury*.

The secretary of state is no conservator nor a justice of the peace, *quasi* secretary, within the words or equity of the *stat. 24 Geo. 2.* admitting him (for argument's sake) to be a conservator, the preamble of the statute shews why it was made, and for what purpose; the only grantor of a warrant therein mentioned, is a justice of the peace; *justice of peace* and *conservator* are not convertible terms; the cases of construction upon old statutes, in regard to the warden of the *Fleet*, the bishop of *Norwich*, &c. are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof; let us compare a justice of peace and a conservator; the justice is liable to actions, as the statute takes notice, it is applicable to him who acts by warrant directed to constables, a conservator is not intrusted with the execution of laws, which by this act is meant statutes, which give justices jurisdiction; a conservator is not liable to actions, he never acts, he is almost forgotten, there was never an action against a conservator of the peace as such; he is antiquated, and could never be thought of, when this act was made; and *ad ea quæ frequenter accidunt jura adaptantur*. There is no act of a constable or tithingman as conservator taken notice of in the statute; will the secretary of state be ranked with the highest or lowest of these conservators? the statute of *Jac. 1.* for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this statute of *24 Geo. 2.* the latter seems to be a second part of the act of *Jac. 1.* and we are all clearly of opinion that neither the secretary of state, nor the messengers are within the *stat. 24 Geo. 2.* but if the messengers had been within it, as they did not take a constable with them according to the warrant, that alone would have been fatal to them, nor did they pursue the

the warrant in the execution thereof, *when* they carried the plaintiff and his books, &c. before *Lovel Stanbope* and not before Lord *Halifax*; that was wrong, because a secretary of state cannot delegate his power, but ought to act in this part of his office personally.

The defendants having failed in their defence under the statute 24 Geo. 2. we shall now consider the special justification, whether it can be supported in law, and this depends upon the jurisdiction of the secretary of state; for if he has no jurisdiction to grant a warrant to break open doors, locks, boxes, and to seize a man and all his books, &c. in the first instance upon an information of his being guilty of publishing a libel, the warrant will not justify the defendants; it was resolved by *B. R.* in the case of *Sbergold v. Holway*, that a justice's warrant expressly to arrest the party will not justify the officer, there being no jurisdiction 2 *Stran.* 1002. The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (*Scroggs C. J.* always excepted) it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed, there might be no body to detect them. If this be lawful, both houses of parliament are involved in it, for they have both ruled, that privilege doth not extend to this case. In the case of *Wilkes*, a member of the commons house, all his books and papers were seized and taken away; we were told by one of these messengers that he was obliged by his oath to sweep away *all papers whatsoever*; if this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does, he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue, at the trial; we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have. This case was compared to that of stolen goods; Lord *Coke* denied the lawfulness of granting warrants to search for stolen goods, 4 *Inst.* 176, 177. though now it prevails to be law; but in that case the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and has strong reason

Hob. 253.
1 Ventr. 31.
Carth. 409.
2 Salk. 418.

to believe they are concealed in such a place; but if the goods are not found *there*, he is a trespasser, the officer in that case is a witness, there are none in this case, no inventory taken; if it had been legal many guards of property would have attended it. We shall now consider the usage of these warrants since the revolution; if it began then it is too modern to be law; the common law did not begin with the revolution, the ancient constitution, which had been almost overthrown and destroyed, was then repaired and revived, the revolution added a new buttress to the ancient venerable edifice: the *K. B.* lately said that no objection had ever been taken to general warrants, they have past *sub silentio*; this is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a secretary of state and the solicitor of the treasury, or such warrants could never have passed for lawful till this time. We are inclined to think the present warrant took its first rise from the licensing act, 13 & 24 *Car. 2. c. 33.* and are all of opinion that it cannot be justified by law, notwithstanding the resolution of the judges in the time of *Cha. 2.* and *Jac. 2.* that such search warrants are lawful. *State Trials, Vol. 3. 58.* the trial of *Carr* for a libel. There is no authority but of the judges of that time that a house may be searched for a libel, but the 12 judges cannot make law; and if a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourite libel, if libels may be searched for and seized by whomsoever and wheresoever the secretary of state thinks fit. It is said it is better for the government and the public to seize the libel before it is published; if the legislature be of that opinion they will make it lawful. Sir *Samuel Astry* was committed to the *Tower*, for asserting there was a law of state distinct from the common law. The law never forces evidence from the party in whose power it is; when an adversary has got your deeds, there is no lawful way of getting them again but by an action. 2 *Stran. 1210. The King and Cornelius. The King and Dr. Purnell, Hil. 22 Geo. B. R.* Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them, and if juries do not prevent them they may prove fatal to liberty, destroy government and introduce anarchy; but tyranny is better than anarchy, and the worst government better than none at all.

Judgment for the plaintiff.

Hilary

Hilary Term

6 Geo. 3. 1766.

Addison *versus* Gray. C. B.

DEBT upon an arbitration bond; the defendant craves oyer of the condition, which is, that if the defendant *Gray* and one *Mary Birkwood* shall perform the award of *Wm. Bradley* and *John Bellamy*, arbitrators, chosen between the said *Gray* and *Birkwood*, and the plaintiff *Addison* concerning all matters in difference between them, so as the award be made in writing on or before the first of *September* then next, then, &c. which being read and heard, the defendant pleads no award was made. The plaintiff replies, and sets out an award whereby the arbitrators awarded that all actions, suits, quarrels and disputes to the day of the date of the bond should cease between the parties, and that the plaintiff should hold and enjoy three acres of meadow in *Glatton* till the 10th of *October* then next, and then he should quit the same to the said *Gray* and *Brickwood*, and that the said *Gray* and *Brickwood* should on or before the 10th of *September* then next pay to the plaintiff the sum of 4*l.* 15*s.* and that they should pay all costs and charges due to the steward and attornies on account of an action of replevin depending in the court of the hundred of *Norman Cross*, and should pay all the costs and charges of the said arbitration bonds and of that their award, and that the parties should execute mutual general releases on or before 29th of *September* then next; and the plaintiff avers, that the said *Gray* and *Birkwood*, or either of them, have not paid to the plaintiff the said sum of 4*l.* 15*s.* or any part thereof, on, or at any day before the said 10th day of *October* then next after the making of the award, according to the form and effect thereof; and this, &c. the defendant demurs, and the plaintiff joins in demurrer.

Debt upon an arbitration bond; an award good in part and bad in part.

Ante Mich.
6 Geo. 3.
Fox v. Smith
S. P.

It was objected for the defendant, that this award was void in awarding costs in an inferior court unsettled and uncertain, and did not make a final end between the parties; but *per curiam*, The award is good for the payment of the 4*l.* 15*s.* and the mutual releases make a final end between the parties, and though other parts

3 Lev. 415.
in point for
plaintiff.

PART II.

4 F

of

of the award be bad, yet the breach is well assigned. Judgment for the plaintiff.

Ravencroft *versus* Eyles, Esq; Warden of the Fleet.
C. B.

1BkA 297

Action upon the case for an escape upon mesne process; the prisoner returns to the Fleet the same day, and the plaintiff proceeds to final judgment, yet the action lies against the warden for damages.

ACTION on the case against the warden of the *Fleet*, for the escape of one *William Warren*; the defendant pleaded Not guilty, and the issue was tried before Mr. Justice *Gould* at *Guildhall* the thirteenth of *June* last, when a verdict was found for the plaintiff, damages 18*l.* 3*s.* costs 40*s.* subject to the opinion of this court upon the following case, (*viz.*)

The said *Warren* being indebted to the plaintiff in the sum of 18*l.* 3*s.* upon his promissory note of hand, and also for goods sold and delivered; the plaintiff in *Trinity* term in the 4th year of the King having made affidavit of his cause of action, delivered a declaration against the said *Warren* to the turnkey of the *Fleet* prison, he the said *Warren* being a prisoner in the custody of the defendant the warden at the suit of one *Palmer*, as is set forth in the plaintiff's declaration.

That afterwards upon the first of *October* the defendant voluntarily permitted the said *Warren* to escape out of the said prison, and go at large out of his custody, the said plaintiff not being satisfied his damages in the said declaration.

That the plaintiff knowing of such escape, on the said first of *October* did notwithstanding afterwards proceed in his said cause against the said *Warren*, and in the then next *Hilary* term obtained judgment against him for the sum of thirty pounds sixteen shillings for his damages and costs, as is set forth in the declaration.

That after having so obtained judgment against the said *Warren*, the plaintiff commenced his present action against the defendant the warden.

That *Warren* having so escaped on the said first of *October*, returned to the *Fleet* prison on the same day, and has ever since continued a prisoner therein in the custody of the defendant.

The question therefore submitted to the court is, whether the plaintiff is intitled to recover in this action against the defendant, he the plaintiff having proceeded to judgment against the said warden, as is above mentioned.

This

*Benjamin
Walker
2.J.R. 126*

This case was argued by serjeant *Davy* for the defendant, and by serjeant *Hewitt* for the plaintiff, in *Hilary* term in the 6th year of King *George* the 3d.

Judgment of the court.

Ld. Ch. Justice *Wilmot*: The question is, whether this action *per* upon the case lies, the plaintiff having proceeded to final judgment against the prisoner *Warren*, after he the plaintiff knew that the warden had voluntarily permitted him to escape; the *quantum* of the damages is nothing to the purpose, for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper, for this being an action upon the case, the damages were totally uncertain and at large, and *Warren* escaped by the permission of the warden before final judgment. But it is objected for the defendant the warden, that the escape was but for a single day, that the plaintiff knew thereof, and proceeded to final judgment, and might have charged the defendant in execution, as he returned again to the *Fleet* the same day, and is now there. But to this I answer, that whenever a gaoler permits a voluntary escape, from that moment he commits a tort, and the plaintiff has a right of action to recover such damages as a jury shall please to give for the same; the prisoner when voluntarily suffered by the gaoler to escape is instantly at large, the gaoler cannot afterwards retake and detain him for the same matter; the plaintiff may retake him by an escape warrant, but has his option to proceed as he pleases either against *Warren* to judgment and execution in this case, or against the warden; I say *Warren* is not now a prisoner at the plaintiff's suit although he be locked up every night, and though the plaintiff might lawfully proceed to judgment against him, yet he could not charge him in execution; and the case of *Key and Briggs, Skin.* 582. is directly in the point; I have not the least doubt but that judgment must be for the plaintiff, and if we should do otherwise we should permit every gaoler in *England* to let his prisoner go at large, as much as if they had never been arrested; if an escape be voluntary in the gaoler, nothing afterwards will purge it. *Salk.* 271. Judgment for the plaintiff *per totam curiam*.

Easter

Easter Term.

6 Geo. 3. 1766.

Truman *versus* Walgham and Key. C. B.

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6P2A 223

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pears to the
contrary.

IN trespass the plaintiff declares that the defendants on the 5th of November 1764. with force and arms, &c. at *Gainsbrough* in the county of *Lincoln* stopped the waggon of the plaintiff drawn by his cattle in and along the King's highway there, and seized and took from the cattle drawing the waggon the geers of the plaintiff, viz. one pair of his iron geers, and carried away, kept and detained the same, and also that the defendants on the 5th of November 1764. with force and arms at *Gainsbrough* seized, took and carried away other geers of the plaintiff, to wit, one pair of iron geers at *Gainsbrough* lately found and converted and disposed thereof to their own use, to the plaintiff's damage of 10*l*.

The defendants as to coming with force and arms, &c. plead Not guilty, and thereupon issue is joined; and as to the residue of the trespasses above supposed, that the plaintiff ought not to have his action against them, because they say, that Sir *Nevile George Hickman Baronet*, at the time when, &c. long before, and yet is seised of the manor of *Gainsbrough* in his demesne as of fee, the said town of *Gainsbrough* (which is an ancient market town and a borough) being situated in and parcel of the said manor, and that the said Sir *Nevile*, and all those whose estate he hath, and at the said time had in his said manor, from time whereof, &c. have at their own proper costs and charges repaired, cleansed and maintained, and have used and been accustomed, and ought to repair, cleanse and maintain *divers and many streets* belonging to the said town or borough as often as was necessary, and by reason thereof have for and during all the time before mentioned of right enjoyed, received and taken, and have used and been accustomed to receive and take as belonging to the said manor a certain toll, of and for every cart and waggon coming from out of any other lordship or manor, and passing over any part of the manor of *Gainsbrough* into the town or borough of *Gainsbrough* at all times in

in the year, except such times during which the common marts or fairs are held at *Gainsbrough* aforesaid, (that is to say) for every cart or waggon of any person or persons whatsoever, except the carts and waggons of the burgeses or inhabitants of the said town or borough, and the carts and carriages loaded with fuel for the use of the inhabitants within the said manor, and the carts and waggons of other persons otherwise exempted, according to the rate of one penny a wheel for every wheel of such cart or waggon, the said toll being payable and to be paid by the person or persons who shall drive or conduct such cart or waggon into the said town or borough, and in default of payment of the said toll, then they have used and been accustomed from and during all the time aforesaid, to distrain any part of the harness of the cattle drawing such carts or waggons, and to keep and detain such distress until the said toll was satisfied and paid to them. And the defendants further say, that at the said time when, &c. and not being the time when any of the said common marts or fairs were held, a certain waggon of the plaintiff having four wheels coming from out of another lordship or manor, that is to say, the lordship or manor of *Lea* in the county aforesaid, and passing over the manor of *Gainsbrough* was driven and conducted by the servant of the plaintiff, and passed into the town or borough of *Gainsbrough* (the said plaintiff not being at the time when, &c. a burges or inhabitant of the said town or borough, nor a person otherwise exempted from the payment of the said toll, and his said waggon not being then loaded with any kind of fuel; whereupon the defendants being collectors of the toll and servants of Sir *Nevile* on that behalf, then and there requested the servant of the plaintiff so driving and conducting the said waggon as aforesaid to pay the toll on that behalf due for the said waggon (that is to say) four pence for the said time when the said waggon of the plaintiff was so driven and conducted by the servant of the plaintiff, and came from out of another manor or lordship, and passed over part of the said manor of *Gainsbrough* into the town or borough of *Gainsbrough* as aforesaid; which said toll the said servant of the plaintiff did then and there refuse to pay, and did not pay, and the said toll is actually yet unpaid; wherefore the defendants, as servants of the said Sir *Nevile*, and by his command, at the time when, &c. at *Gainsbrough* aforesaid did in the name of a distress for the said toll stop the waggon of the plaintiff drawn by his cattle in the King's highway at *Gainsbrough* within the manor and town or borough aforesaid, and in the name of a distress for the said toll did then and there seize and take from the said cattle drawing the said waggon the said iron geers of the plaintiff in the declaration specified, and did carry away keep and detain the same, as it was lawful for them to do; which is the same residue of the trespasses whereof the plaintiff above complains against them; and this, &c.

PART II.

4 G

And

The plaintiff
replies de in-
juria sua pro-
pria, and tra-
verses the pre-
scription.

And the plaintiff, as to the said residue of the trespass in the above plea says, he ought not to be barred, &c. because he says that the defendants at the time when, &c. at *Gainsbrough* of their own wrong stopped the plaintiff's waggon drawn with his cattle, &c. and seized and took from the cattle, &c. the geers of the plaintiff in the declaration first mentioned, and carried away, kept and detained the same, and also at *Gainsbrough* seized, took and carried away the other geers of the plaintiff in the declaration secondly mentioned, there found and converted and disposed thereof to their own use, as the plaintiff has above complained against them; *without this*, that the said Sir *Nevile George Hickman*, and all those whose estate he hath and at the said time had in his said manor, from time whereof, &c. have at their own proper costs and charges repaired, cleansed and maintained, and have used and been accustomed and ought to repair, cleanse and maintain *divers and many streets belonging* to the town and borough of *Gainsbrough* as often as was necessary, and by reason thereof have for and during all the time aforesaid of right enjoyed, received and taken, and have used and been accustomed to receive and take, as belonging to the said manor, a certain toll of and for every cart and waggon coming from out of any other lordship or manor and passing over any part of the manor of *Gainsbrough* in the said town or borough of *Gainsbrough*, at all times in the year, except such times during which common marts or fairs are held at *Gainsbrough*, that is say, for every cart or waggon of any person or persons whatsoever, except the carts and waggons of the burgesses or inhabitants of the said town or borough and the carts and carriages loaded with fuel for the use of the inhabitants within the said manor, and the carts and waggons of other persons exempted, according to the rate of one penny a wheel for every wheel of such cart or waggon, the said toll being payable and to be paid by the person and persons, who shall drive or conduct such cart or waggon into the said town or borough, as the said defendants have by their said plea in that behalf above alledged; and this he is ready to verify; wherefore inasmuch as the defendants have acknowledged the stopping the said waggon of the plaintiff, &c. the plaintiff prays judgment and his damages by reason of those trespasses, to be adjudged to him, &c. The defendants take issue on this traverse of the prescriptive right, and thereupon issue is joined; which was tried at the last *Lincoln* assizes, when a verdict was found for the defendant.

It was moved for the plaintiff in arrest of judgment, that this is a bad prescription, being for a toll thorough which cannot be good without a good consideration, which is not shewn or pleaded in this case, for it is not alledged that the lord of the manor repairs, cleanses and maintains *all the streets in Gainsbrough, but only divers and many*

many streets, so that for any thing that appears on these pleadings the plaintiff's waggon might be passing through a street in *Gainsbrough* which the lord of the manor doth not repair; this is clearly a toll thorough a street which the lord has not shewn that he repairs; and this objection alone was relied upon.

For the defendant it was admitted, that a toll thorough cannot be taken where there is no consideration, but insisted the consideration here alledged is sufficient, and need not be so large as the prescription; that it is sufficient, if there be a charge to the lord, and a benefit to the King's subjects, that the repairing *divers and many streets* is a benefit to the inhabitants and all persons whose particular business calls them thither, and to all the King's subjects who pass through that town; many cases were cited touching toll thorough, and toll traverse, but as none of them are exactly in point, it is unnecessary to set them down. The court took time to consider, and in this term arrested the judgment.

Curia: This is a prescription for a toll through the King's highway, the streets of *Gainsbrough*; which cannot be taken without a good consideration be alledged; the reason is, because it is to deprive the subject of his common right and inheritance, to pass through the King's highway, which right of passage was before all prescriptions. *Moore* 574, 575. Toll traverse, or for going through a man's private land, may be prescribed for, without any consideration; and payment time out of mind is sufficient, and will support the prescription. In the case at bar toll is demanded of the subject in the King's highway for passing there, the subject ought to have a benefit for paying it; the consideration here is for repairing, cleansing and maintaining *divers and many streets* in *Gainsbrough*, not for repairing, &c. all the streets there; how therefore can we say that the plaintiff's waggon was passing through any street repaired by the lord of this manor, the waggon might be passing over some street not repaired by him when the distress was taken for any thing that appears to the contrary, and we must take it that it was so; we cannot let the defendant have judgment upon this record. Courts are exceeding careful and jealous of these claims of right to levy money upon the subject; these tolls began and were established by the power of great men. The defendant's plea is as bad as can be, the lord has artfully tried to make it doubtful, whether this be a toll thorough or toll traverse, for he has confounded them together; the consideration he claims it for, is for mending the highway, and he would have us believe it is for passing through his own manor or land. The judgment was arrested upon the merits, *per totam curiam*.

*q. shd not this have
been a motion for
entering up judgment
for the Def non
obstante Verdicto.
butes Rep. 366.
1. Tenn. Rep. 123
2. Tenn. Rep. 759
4 Burr. 2515
2 Engl. 716.*

Beavor *versus* Hides. C. B.

Words.
He was put
in the round-
house for
stealing ducks
at Crowland,
are action-
able.

1 Ro. Abr.
64. p. 6.

ACTION for scandalous words; five sets were laid in the declaration, and upon the general issue, there was a general verdict for the plaintiff upon the whole declaration; one of the sets of words were these, *viz.* *He* (meaning the plaintiff) *was put into the roundhouse for stealing ducks at Crowland*, which were alledged to be spoken of the plaintiff by the defendant *falsely and maliciously*. And it was moved in arrest of judgment that the words were not actionable, for the defendant doth not say expressly that he stole the ducks, like the case in *Cro. Eliz.* 234. "*I have served thee with the Queen's letter for stealing goods in my mothers house,*" were held not actionable. "*Thou art a false knave, thou wast arraigned for two bullocks,*" held not actionable. *Cro. Eliz.* 279. and it was said if the words had been, "*Thou art a false knave, thou wast arraigned for stealing two bullocks;*" these words would not have been actionable, for a man may be arraigned for felony, and yet no felon. "*James Steward is in Warwick gaol for stealing a mare and other beasts;*" after verdict the whole court gave their opinion *seriatim*, that these words would not bear an action, for they do not affirm directly that he did steal the beasts. *Hob.* 177.

In answer, it was said for the plaintiff that these words are alledged to be *falsely and maliciously* spoken of the plaintiff by the defendant, and the jury have found that they were so *maliciously and falsely* spoken, like the case in *Cro. Car.* 268. "*He was arraigned at Warwick for stealing of twelve hogs, and if he had not made good friends it had gone hard with him*"; *ubi re verá* he never was arraigned for felony. After a verdict, these words were held to be actionable, being laid to be spoken *falsely and maliciously*. "*Thou art a clipper, and thy neck shall pay for it*"; after a verdict held actionable, though the word clipper be ambiguous. *Skin.* 183. "*You are a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over 40*l.* to make up the breach*"; held actionable, though the word *rogue* is not; and breaking upon a house is only a trespass. *Skin.* 364. "*He was sent to prison for running wool*"; held to be actionable by *Lee C. J.* at Guildhall; "*He was whipt about Taunton castle for stealing sheep*", were held actionable 1 *Ro. Abr.* 50. pl. 9.

This motion in arrest of judgment was made in *Michaelmas* term last, when the court thought the cases cited for the defendant were in point, that these words are not actionable.

Lord Camden said, if we should judge these words actionable, many actions would arise at every assizes in the kingdom, where the common

common topic of conversation is, that such a man was sent to gaol for such a crime, and such a one was arraigned, and tried, &c. &c. and if such words are true, where is the slander? saying "a man was whipt", if the words are true, is no slander.

Bathurst Justice, also inclined to think the words were not actionable, but thought that if this particular set of words were not proved at the trial, the *posita* (upon the judge's certificate that they were not proved) might be amended, and a verdict for the defendant entered as to this set of words, if any precedent for it could be found; for he said, if they were not proved, the plaintiff ought not to have had a verdict upon them; but if this cannot be done, he thought the cases cited for the defendant so strongly in point that the court were bound by them. Gould justice was of the same opinion, and said the case in *Hob.* 177. was so strong for the defendant, and so solemnly determined, that he could not well get over it.

Lord Camden, (in answer to Mr. Justice Bathurst) said it would be very dangerous after a verdict of 12 men recorded by the court to refer to the judge's notes, in order to alter it; and he thought there was no precedent of such a case, and that a verdict cannot be varied. And the court at this time pronounced that the judgment must be arrested, unless cause the last day of the term (*Hilary* term last). But at *that* day they adjourned it for further consideration; and after having taken time till this term, the court changed their opinion, and gave judgment for the plaintiff, that the words were actionable.

Lord Camden: Upon considering this case more fully, we are now all of opinion that these words being laid in the declaration to be spoken *falsely and maliciously* of the defendant, are actionable; we must take it upon this record that the plaintiff was really not put in the roundhouse or imprisoned for stealing of ducks, because the jury have found that the words were *falsely* spoken; the words clearly import that the plaintiff had been guilty of a crime, and if the fact had been true the defendant might, and ought to have justified; if we should arrest the judgment, the *malevolent* would think the plaintiff had been guilty of the crime falsely imputed to him, and the *good natured* could not help suspecting him to have been so. We lay great stress upon the word *false*; if words are true they are no slander, but may be justified. The objection here is, that the words do not expressly alledge that the plaintiff stole ducks; but words are to be taken according to the common *parlance*, and to be spoken in the worst sense according to the common understanding of the bystanders. *Cro. Jac.* 154. "I know what I am, I know what Snell is, I never buggered a mare"; it was objected these words were not actionable, for they do not charge the plaintiff with bug-

Cro. Jac. 247,
268.
1 Lev. 82.
Moor 868.

gery; but the court said they implied a charge of buggery, and gave judgment for the plaintiff. 2 Lev. 150. The words in the present case must be taken to be *false*, and to throw a stain upon the plaintiff's character.

Judgment for the plaintiff *per totam curiam*.

Goslin *versus* Wilcock. C. B.

An action lies for suing plaintiff in an inferior court maliciously, and arresting him, when that court had no jurisdiction of the cause.

A new trial was refused though the declaration was faulty in not alledging that the defendant knew the inferior court had no jurisdiction of the cause.

SPECIAL action upon the case, wherein the plaintiff declares, that whereas by the laws of this realm no person ought to be arrested, impleaded or imprisoned without a probable cause of action against him, yet the defendant *falsely and maliciously*, without any *probable cause* of action, in the King's court of record held at and for the borough of *Bridgwater* in *Somersetshire* on the 30th of *September* 1765. levied a plaint against the plaintiff in a plea of trespass upon the case to the damage of 10*l.* and afterwards at the same court on the same day sued out upon the said plaint a writ of *capias ad respondendum* directed to the bailiffs of the borough, to take the plaintiff, and have his body before the judges of that court on *Monday* after the service of that writ, to answer the defendant in the said plea; which writ the defendant *falsely and maliciously* caused to be indorsed for bail 5*l.* 3*s.* 11*d.* against the plaintiff; and the defendant further *falsely and maliciously*, and without any probable cause afterwards on the 3d of *October* 1765. at the said borough caused the plaintiff to be arrested and kept in custody 24 hours, without any *probable cause*, *when in truth and in fact the defendant had not at the time of the levying the plaint, or of the said arrest and imprisonment, any just or probable cause of action against the plaintiff for which he ought to have been arrested and imprisoned*; and the defendant hath not declared against the plaintiff in that plea, nor further prosecuted his said plaint, but hath discontinued the same, and the same suit is long since ended and determined; and the plaintiff in fact says, that by means of the premisses he is greatly injured and damaged, and hath been put to great charges in freeing himself from the said imprisonment, and forced to undergo grievous pains of body and mind, and, during his imprisonment, was hindered from exercising his lawful employment, trade and business, and lost the whole profit thereof at the borough aforesaid to his damage of fifty pounds. The defendant pleaded Not guilty of the premisses laid to his charge. and thereupon issue is joined.

This cause was tried at the last *Somersetshire* assizes before Mr. Justice *Aston* at *Taunton*, when the jury gave a verdict for the plaintiff and 5*l.* damages. The judge reported that it appeared in evidence at the trial, that the plaintiff and defendant both lived at *Taunton* a quarter of a year together, that the plaintiff being all that

time indebted to the defendant in about 5*l.* upon a contract at *Taunton*, where the plaintiff appeared publicly, and might have been arrested for the same there at any time; that the defendant said, that if he could not do for the plaintiff at *Taunton* he would do for him at *Bridgwater*; that afterwards at the fair at *Bridgwater*, when the plaintiff was standing at his stall *there* exposing his goods to sale, the defendant came along with the bailiffs to the stall, and said to the bailiffs, *there is the rogue, there is your prisoner*, whereupon they instantly arrested the plaintiff in the fair; the *plaint* levied and the *capias* indorsed for bail were also proved; there was also evidence of the injury the plaintiff suffered, and the expences he was put to on this occasion; there was no witness called for the defendant, but it was admitted that he discontinued his action in the borough, when he knew it would not lie there, and that he brought another action against the plaintiff for what he owed him, and had got a verdict at that assizes for the same, so that there really was a debt owing by the plaintiff to the defendant, at the time the plaintiff was arrested at the suit of the defendant in the borough court of *Bridgwater*, though it was not contracted within that jurisdiction; but the judge was of opinion, that the arrest *there* at the time of the fair was done maliciously, and was satisfied with the verdict.

It was moved for a new trial, because the evidence did not support the declaration, (with leave given to the defendant at the same time to move in arrest of judgment in case he should not succeed in this motion); it was objected that the gist of this kind of action is *malice*; as where a man *maliciously* arrests another when there is really no debt at all owing, or where one maliciously arrest another for a far larger sum than is really due, with an intent to oppress him and prevent his friends from being bail for him, but the *malicious intention* must clearly be made to appear, and must be expressly averred in the declaration; in the present case it appears there was really and *bona fide* a debt of 5*l.* and upwards owing from the plaintiff to the defendant at the time of the arrest at *Bridgwater*, and that the defendant not knowing but that he might lawfully sue plaintiff *there* caused him to be arrested there, but as soon as he was informed that court had no jurisdiction, he discontinued his action, and brought another in a superior court, and has recovered; so there appears no malice in the case. 2dly, It was objected that an action will not lie either against the judge, officer, or party, for arresting a man in an inferior court, when there is no cause of action within that jurisdiction; and the case of *Temple v. Killingworth B. R. Hil. 2 W. & M. Rotulo 725. Carth. 189. 1 Show. 254. S. C. 12 Mod. 4. S. C.* was cited as in point, wherein the plaintiff declared thus, *viz.* " *Petrus Temple queritur de Samuele Killingworth in custodia marescalli marescalliæ, &c. pro eò videlicet quod prædictus Samuel machinans & malitiosè intendens eundem Petrum magnoperè prægravare & minùs justè opprimere 25 die Aprilis anno regni domini* " *regis*

“ regis & dominæ reginæ nunc primo, injustè & malitiosè apud Lon-
 “ don prædictum in parochia, &c. in warda, &c. prætextu & co-
 “ lore cujusdam prætensæ querelæ in curiâ dictorum domini regis
 “ & dominæ reginæ ad tunc tenta coram Johanne Flint milite tunc
 “ uno vicecomitem civitatis Londini prædicti in computatorio suo
 “ scituato in parochia & warda prædictis intratæ & levatæ ad sectam
 “ ipsius Samuelis super quandam prætensam actionem ad magnum
 “ prætensum damnum ipsius Samuelis arrestari & imprisonari ibi-
 “ dè causavit & procuravit, ac prædictum Petrum in prisona &
 “ custodia ibidè ratione arrestationis prædictæ per magnum tem-
 “ pus scilicèt per spatium sex dierum detineri fecit pro defectu suf-
 “ ficientium manucaptorum & securitatis ad prætensam actionem
 “ prædictam pro prædicto prætensio damno, ubi re verâ & in facto
 “ prædictus Samuel tempore arrestationis & imprisonamenti ipsius
 “ Petri prædicti ut præfertur, vel ad aliquod tempus antea, nullam
 “ habuit causam actionis versus præfatum Petrum intra jurisdic-
 “ tionem ejusdem curiæ; ratione quorum quidem injustè malitiosè ar-
 “ restationis & imprisonamenti prædicti ipsius Petri ipse idem Petrus
 “ non solum in prisona & custodia per totum tempus prædictum de-
 “ tentus & de libertate sua deprivatus fuit super prædictam præten-
 “ sam actionem ob prætensum damnum prædictum verumetiâ
 “ magnos labores et expensas pro relaxatione sua ab arrestatione &
 “ imprisonamento illis erogavit ac subire & erogare compulsus fuit,
 “ unde dicit quod deterioratus est & damnum habet ad valenciam
 “ quingentarum librarum et inde producit sectam, &c.” The de-
 fendant pleaded the general issue Not guilty, and there was a verdict
 for the plaintiff. It was moved in arrest of judgment, that the plain-
 tiff (when he was defendant below) ought to have pleaded to the ju-
 risdiction of the Sheriff’s court, and if the plea had been refused, then
 a prohibition would have been granted; the court inclined to that
 opinion, and judgment was stayed till the plaintiff should move
 it again; and afterwards the plaintiff moved for judgment, and the
 cases in the * margin were cited to maintain the action, but the
 court was not satisfied with the action. There does not appear any
 judgment entred upon the roll; in *Showers* 254. S. C. *Holt* C. J.
 said the point was fit to be considered by all the judges; and in
 12 *Mod.* 4. S. C. *Holt* C. J. said of late it is held that *case*
 will not lie for prosecution in an inferior court where the court has
 not jurisdiction; that the first case in point was at *Huntingdon* affi-
 zes, and referred to the C. B. and there adjudged that for suing one
 without any cause of action at all no action lies, unless it appears to
 be with a *malicious* and *vexatious* design; eight of the judges seemed
 to think the action would not lie.

* Heb. 105.
 Cro. Jac. 667.
 Cro. El. 628.
 636.
 Stat. 3 Ed. 1.
 cap. 38.
 Regist. 98.
 F. N. B. 45.
 (F)
 1 Sand. 221.
 Sid. 463.
 4 Rep. 14. b.
 1 Vent. 369.

It was answered by the counsel for the plaintiff that it appears
 by the judges’s report, in this case at bar, the time, place and every
 circumstance attending the arrest at *Bridgwater*, that it was done
 with

with a *malicious* design to injure the plaintiff in the sale of his goods at the fair, and to expose him to his customers; the defendant must certainly know that the borough court at *Bridgwater* had no jurisdiction, and his discontinuing the action after he had executed his malicious design will not avail him; and 2dly, that it is a rule in law, that wheresoever a man suffers an injury, joined with a loss, the law shall give him a remedy and recompence. *Hob. 45.* and no remedy or satisfaction can be had in this case unless this action will lie; for false imprisonment certainly will not lie. *Gwinne v. Pool & al'*, 2 *Lutw.* 935, 1571, 1572. And that an action will lie for suing in an inferior court without any cause of action within the jurisdiction was held good, was cited, 2 *Shower* 328. *Hudson* and *Cooke*.

In reply to the case of *Hudson* and *Cooke*, was cited what Sir *John Fowel* said in his learned argument in the case of *Gwinne v. Pool*. 2 *Lutw.* 1571, 2. in regard to the case of *Hudson* and *Cooke*: "I was present (says he) when the case of *Hudson* and *Cooke* was adjudged; it was an action upon the case brought against the defendant for commencing an action in an inferior court where the cause of action arose out of the jurisdiction of that court; Not guilty was pleaded, and a verdict for the plaintiff; and an exception was taken in arrest of judgment, for that it was not shewn that the defendant knew that the place where the action arose was out of the jurisdiction. But it was held by *Jefferys*, *Holloway* and *Walcot*, that it was aided by the verdict; *Witbens* justice being of a contrary opinion; I confess (says he) that I then thought it strange that the *gist* of the action should be aided by the verdict"; therefore the defendants counsel insisted this case of *Hudson* and *Cooke* is not law.

Lord *Camden*: Baron *Powell* in his argument of *Gwinne* and *Poole* has stated the learning of cases of this kind, but hath not laid down any precise rule of law; this is a nice case, and is to be looked into with precision. There are no cases in the old books of actions for suing where the plaintiff had no cause of action; but of late years when a man is *maliciously* held to bail where nothing is owing, or when he is *maliciously* arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due; whenever this kind of action is brought, the particular *gravamen* must be alledged in the declaration, and it must be laid that it was done *maliciously*, and with an intent to injure and oppress; the fact of the evidence in the present case is, that the defendant at *Bridgwater* said, "I know I can catch you here though I could not at *Taunton*"; but this doth not prove that he might not think that

the action would lie at *Bridgwater*; and it seems to me that he did not know to the contrary when he levied his plaint, because as soon as his attorney informed him that it would not lie *there*, he discontinued his suit; I think the declaration is ill, because it is not alleged in the declaration, that the defendant knew that the place where the cause of action arose was out of the jurisdiction of the borough court of *Bridgwater*, and that the case proved at the assizes is different from the case stated in the declaration, and if it be so, we ought to grant a new trial.

Clive Justice: This is the first action of the kind I have ever seen brought for suing in an inferior court which has not jurisdiction, and I am inclined to think the declaration will not support the evidence.

Bathurst Justice: This is a motion for a new trial, as being a verdict against evidence; I cannot help agreeing with the judge who tried this cause, that the arrest at *Bridgwater* was *maliciously* done; it then comes to this question, whether an action upon the case will not lie for suing in an inferior court which has not jurisdiction, with the circumstances of *malice*, which manifestly appear; and I am very clear that it will lie, but think this declaration is not rightly drawn, it ought to have alleged that the defendant knew that the cause of action did not arise within the jurisdiction of the court at *Bridgwater*, and then it would have been right enough. But the court can see in this case that justice and equity are with the plaintiff, and they never will grant new trials, where the verdict is on the honest side of the cause; the case of *Smith v. Page*, 2 Salk. 644. is a very strong case to this purpose: In ejectment, the plaintiff was a mortgagee and claimed by surrender, whereas the land was not copyhold, and the defendant claimed only by a voluntary conveyance, the verdict was for the plaintiff, and the court of B. R. would not set it aside, and grant a new trial against the honesty of the cause; so in the present case, I think the honesty of the cause is with the plaintiff, and therefore I am for supporting the verdict if possible. When a defendant has got a verdict in a hard action, the court will not grant a new trial, and in many cases, as in *qui tams*, no new trial is ever granted, where the defendant has got a verdict.

Gould Justice: I am of the same opinion with my brother *Bathurst*, as to the malice in the defendant, and the justice of the plaintiff's cause, and think the defendant was conscious that he had no right to arrest the plaintiff at *Bridgwater*; and the court will be *astute* to support this verdict as they see it is on the side of justice, and will not grant a new trial. I am inclined to think this declaration is well enough, for it is alleged, *That the defendant maliciously, without any probable cause, at the said borough caused the plain-*
tiff

tiff to be arrested; when in truth and in fact the defendant had not at the time of the levying the plaint, or of the arrest and imprisonment, any just or probable cause of action, for which he ought to have been arrested and imprisoned; I think this is a substantial disclosure and allegation of his cause of action, and was sufficient notice to the defendant to come with proof and shew at the trial that he had a cause of action arising within the jurisdiction of the court at *Bridgwater*, and that the plaintiff in his declaration was not obliged to aver, that the defendant knew his cause of action did not arise within the jurisdiction of that court, for this is matter of evidence, which no man is obliged to set out in his pleadings. As at present advised, I think this declaration is substantially good: but supposing it is not, yet in such a case as this we ought not to grant a new trial. The court being divided, took time to consider; and afterwards in this same term, *Lord Camden* and Mr. Justice *Clive* agreed in opinion with Mr. Justice *Bathurst* and Mr. Justice *Gould* to refuse a new trial.

Lord Camden: I think, upon further consideration, that as the justice and equity of the cause is on the side of the verdict, we ought not to grant a new trial; I shall always be willing to grant a new trial, where the equity and justice of the case is with him who prays it, if the law and circumstances of the case will permit; and shall be as willing to refuse a new trial, where I am warranted to do so by precedents. The granting new trials began within time of memory, and I will not extend the practice of granting them further than precedents have already gone. This is an action for bringing a suit at law; and courts will be cautious how they discourage men from suing; where a party has been maliciously sued and held to bail, *Malice*, and that it was without any probable cause, must be alleged and proved. Upon more mature consideration, we are all now of opinion, that if you hold a man to bail in an inferior court when you know it hath not jurisdiction, and with malice, an action upon the case will lie. And that if the plaintiff had averred, that the defendant knew that his cause of action did not arise within the jurisdiction of the court of *Bridgwater*, we are all clear of opinion the declaration would have been good; that single averment, together with malice, would have been sufficient without any other. The plaintiff and defendant lived in the same town of *Taunton* a quarter of a year together, and the defendant to whom he was indebted all that time, never sued him there (though it is not pretended but the plaintiff always appeared publickly), but the defendant follows him to *Bridgwater* and abuses him there publickly, and arrests him in the fair at his stall, when the defendant must know that the court there had no jurisdiction; we are forced to say the verdict is according to the justice of the case, and on a motion for a new trial were are desired to grant it for a fault in the declaration

against the justice of the case; but if I had only the case of *Deerly v. The Dukes of Mazarine*, 2 Salk. 646. to warrant me (though the jury were liable to an attain in that case), I would not grant a new trial in the present case. So a new trial was refused by the whole court.

6 M. 204. 2. Hill 473
813-6728

Williams *versus* Leaper. C. B.

What is or
is not a pro-
mise within
the statute of
frauds and
perjuries.

ONE *Taylor* was indebted to the plaintiff *Williams* in 45*l.* for three quarters of a year's rent for a messuage which he held of him; and *Taylor* becoming insolvent, made a bill of sale to the defendant *Leaper* of all his goods in the said messuage in trust, to be sold for the use of his creditors. While the defendant was in possession of the goods upon the premises, the plaintiff (the landlord) came there to distrain for his rent, whereupon the defendant, in consideration that the plaintiff would not distrain, undertook and promised to pay the plaintiff the said sum of 45*l.* and upon that promise this action is brought against the defendant for non-payment of the money, and was tried before Lord *Mansfield* at *Guildhall, London*; verdict for the plaintiff, subject to the opinion of the court; whether this promise (not being in writing) was within the statute of frauds and perjuries, as being a promise to pay the debt of another person. This point was debated by Mr. *Morton* for the plaintiff, and Sir *Fletcher Norton* and Mr. *Wallace* for the defendant; to shew that it was not within the statute was cited *Read v. Nash*, Trin. 24 & 25 Geo. 2. B. R. And that it was within the statute was cited *Fish v. Hutchinson*, Trin. 32 & 33 Geo. 2. C. B. ante fol.

Curia: This is not a promise to pay the debt of another, the goods were debtor, and the defendant was in nature of a bailiff for the landlord, and if the defendant had sold the goods and received money for them, an action for money had and received for the plaintiff's use, would have laid in this case by all the justices except *Aston*, who thought if the goods had not sold for so much money as the plaintiff's rent, he would have been liable for no more than what they sold for; but *per Yates* Justice, the defendant's promise is an admission that the goods were sufficient to satisfy the plaintiff's demand, and it was a new contract, upon a good consideration; the defendant had an interest, and the plaintiff gave up his right to distrain. Judgment for the plaintiff *per totam curiam*.

Blaxton *versus* Pye. C. B. 7

AN action of *assumpsit* upon a wager of 14 guineas to 8 guineas by the plaintiff, with the defendant upon two races to be run by two horses called *Elephant* and *Granby*, that *Elephant* would win one of the races, viz. that if *Elephant* won one of the races, defendant promised to pay plaintiff 8 guineas, and in consideration thereof if *Elephant* won neither of the races, plaintiff promised to pay defendant 8 guineas, the event was, that *Elephant* won one race, so the defendant lost the wager; after verdict it was moved in arrest of judgment, that the consideration of laying 14 guineas to 8 guineas in this case is *nudum pactum*, because the laying above 10 pounds upon a horse race is a bet within the statutes against gaming; if the statute of 16 Car. 2. c. 7. and the stat. 9 Ann. c. 14. be taken together; so that plaintiff could not possibly lose the 14 guineas and therefore ought not be allowed to win the 8 guineas of the defendant; and of that opinion was the whole court, and the judgment in this case was arrested; and the court said they ought to extend the stat. of 9 Ann. to prevent excessive betting upon all sports as well as games, and that although horse-racing is not mentioned in that statute, yet it is within the general words *other game or games*, as in the case of *Goodburn v. Marley*, 2 Stra. 1159. See *Lynell and Longbottom ante fo. 36.* and *Levit and Thompson*, 3 G. 3. C. B.

Horse-race is gaming within stat. 9 Ann.

Alcinbrook *versus* Hall. C. B.

ACTION upon an *assumpsit*, for money paid by the plaintiff for the defendant at his instance and request. The case was this, viz. The defendant having lost a sum of money above ten pounds, upon a bet at a horse-race, requested the plaintiff to pay it for him, which he did; the defendant objected that this money being lost at gaming, and recoverable back again by the stat. 9 Ann. c. 16. this action would not lie; but the court held this was not a case within the statute, for there is not the word contract, as in the statute of usury; Stra. 1249. so the court here held this was not a case within the stat. 9 Ann. and gave judgment for the plaintiff.

Money lost by the defendant on a bet upon a horse-race and paid by plaintiff at his request, an action lies for it.

Trinity Term

6 Geo. 3. 1766.

3 Adrl. 405

Mary Hayes *versus* Samuel Long, clerk. C. B.

Action for a
malicious pro-
secution on an
indictment.

ACTION upon the case, wherein the plaintiff declares, that whereas she is an honest subject, and never was guilty of keeping a bawdy-house, yet the defendant well knowing this, *falsly and maliciously, without any probable cause* on the 13th of April 1765. at *Benson* in the county of *Oxford*, charged and accused her of being known to keep a lewd and disorderly house, and of permitting several young gentlemen from *Oxford* frequently to resort to her house at late and unseasonable hours, and letting them stay with her all night, and of behaving in a riotous and indecent manner at *Benson*, and of being a public nuisance to the inhabitants thereof, and then and there *falsly and maliciously, without any probable cause*, caused the plaintiff to be arrested for the same supposed offences, and carried from thence to *Oxford*, in custody before *Thomas Randolph* D.D. a justice of peace for the said county, and there at *Oxford* *falsly and maliciously, and without any probable cause*, caused the plaintiff to be examined before him, and on that occasion to be kept in custody for five days, when in truth and in fact the plaintiff never was guilty of any of the said offences; and the defendant afterwards at the general quarter-sessions holden at *Oxford* for the said county the 16th of April in the 5th year of the King before *Theophilus Leigh*, D.D. and others, justices of peace of the said county, *falsly and maliciously without any probable cause* indicted the plaintiff, for that she on the 1st of May in the 4th year of the King, and on divers days between that day and the day of preferring the indictment at *Benson*, did keep and maintain a common ill governed disorderly house, and in her house for lucre and gain permitted drinking and whoring, to the common nuisance of the public, and against the peace, &c. and the defendant maliciously, &c. prosecuted the indictment until the plaintiff, at the quarter-sessions held at *Oxford* the 23d of July in the 5th year of the King, was thereof by a jury of the said county lawfully acquitted on account of which indictment and premisses, the plaintiff has been much
damnified

damified and obliged to pay large sums of money, to the plaintiff's damage of 1000 l.

The university of *Oxford* come and claim conusance; setting forth the privileges of the university, under a charter of 14 H. 8. by which the King grants to the university the conusance of all causes, where either plaintiff or defendant is a member thereof, though the cause of action arise in any part of the kingdom, with an exclusive clause that no justice (and particularly mentions the judges of this court) shall presume to intermeddle in any case arising within the jurisdiction of the university, which charter and privileges are confirmed by an act of parliament of 13 Eliz. The defendant makes an affidavit, and swears he is, and, for 21 years past, has been a member and student of the college of Christ church, that he is now resident there; whereupon the court made a rule for the plaintiff to shew cause why the claim of conusance should not be allowed.

Claim of conusance refused to the university of Oxford, the party though a member not being resident at Oxford.

Upon shewing cause, an affidavit was produced by the plaintiff, which swears that the defendant generally resides, and is obliged to reside, at *Benson*, where he has a college living, and though his name remains upon the books of the college, and he is still a member thereof, yet he has no room or chamber there to reside in; thereupon it was insisted for the plaintiff, that conusance of pleas ought not to be allowed to the university for two reasons, 1st, Because the cause of action arose at *Benson* out of the university; 2dly, That the defendant had no right to the privilege of the university, he having ceased to reside there as a student and member thereof, and being obliged to reside upon his living at *Benson*; like the case of an attorney, after he has left off practising, and no longer attends this court, he shall not be intitled to privilege, notwithstanding his name remains upon the roll of attornies.

In answer, it was said for the defendant, that the plaintiff was indicted at *Oxford* for keeping a bad-house at *Benson*, and therefore the cause of action arose at *Oxford*; but however that was, the privilege extends all over the kingdom; and 2dly, he is sworn to be a member of the university, and sometimes resides there, and sometimes upon a college curacy at *Benson*.

Lord Camden: The charter extends to actions arising in any part of *England*; but surely it could never intend that scholars as plaintiffs should have the privilege of suing in the university in causes of action arising in any part of *England*; but when they are defendants, this privilege extends all over *England*. The charter was granted and confirmed by parliament to the members of the university in consideration of their being *resident* there, and the privilege extends from the highest member to the lowest servant there residing. The superior

superior courts construe this privilege very strictly, therefore it ought to be made to appear clearly to the court that the defendant is a scholar residing. Great numbers of persons remain on the books long after they have left the university, on purpose to vote for members, &c. many who are fellows of colleges never go thither at all; I myself was one a long time, and never went there at all; it would be strange if this court should allow conusance in cases where such persons are defendants; it is therefore absolutely necessary that residence should be proved to the court; the claim under the seal of the university says not one word of the residence of this defendant, and so we can see why the courts have required affidavits of the residence; yet if the Chancellor should certify falsely that a person is resident who is not, there is no doubt but an action upon the case would lie against him, and therefore the Chancellors do not choose to certify residence; and I am inclined to think the Chancellor knew that this defendant was not resident, and so did not certify that matter; *Long's* affidavit is a subterfuge under the word *residence*, which is indefinite; if a man resides for one night, and swears he was resident, he could not be convicted of perjury; it is certain he is curate of *Benson*, and has a family there, and frequently resides at *Oxford*, but he does not say how long together.

In similar cases, as that of an attorney leaving off to practice, though his name remains on the roll, he is no longer intitled to the privilege of the court; I am of opinion that conusance ought not to be allowed.

Clive Justice: I am of the same opinion; the case of an attorney's privilege is similar to this. I think there needs no affidavit of the residence, but that the Chancellor ought to certify residence, or the conusance ought not to be allowed; however it appears to the court that the defendant is not resident at *Oxford*, but upon his curacy at *Benson*.

Bathurst Justice: If we were to say that every member whose name is in the books of the university was intitled to this privilege, it would be very inconvenient; residence of the party ought to appear upon record, and must be entred before it can be allowed; the university of *Cambridge* claimed conusance, and produced the certificate of the Chancellor, that the parties were of the university. And upon the rule to shew cause it was objected that the claim ought to be entred on the roll, and an affidavit to verify the certificate should be produced; and of that opinion was the court, and discharged the rule. *Paternoster v. Graham*, 2 *Stran.* 810. and in the case of *Kenrick and Kinaaston B. R.* the claim was entred on record. The claim of conusance is tantamount to a plea in abatement of the suit here, the truth whereof must be verified by affidavit;

vit; *stat. 4 Ann.* this seems to be the reason why affidavits were first introduced, and required in these motions for allowing consufance. An affidavit therefore seems necessary as well as the Chancellor's certificate of residence, and we cannot allow this claim of consufance, before it appears to us upon record that the party is resident in the university.

Gould Justice: I am of the same opinion; where the suggestion for a prohibition is defective, you cannot have a prohibition.

Claim of consufance disallowed *per totam curiam.*

Gates *versus* Bayley. C. B.

TRESPASS for taking and impounding the plaintiff's cattle, and keeping them in the pound so closely confined together, that by reason thereof one of the beasts died; the defendant 1st pleads the general issue to the whole declaration, and thereupon issue is joined; and 2dly, a justification under the corporation of *London* that he took the cattle *damage feasant*, and put them into the pound, as it was lawful for him to do; the plaintiff replies *de injuria sua propria*, and thereupon issue is joined; the jury gave a verdict for the plaintiff upon the general issue, and the value of his beasts that died in damages; upon the other issue on the justification they found for the defendant.

Trespass for 5 Bel 485
impounding
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one died.
Justification
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and need not
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in trespass.

And now it was moved that judgment might be entred for the defendant, because the jury have found for him upon the justification, which covers the whole trespass in the declaration; and the beasts dying after being put into the pound is only *gravamen*, and does not make the defendant a trespasser *ab initio*; if the plaintiff can have any action for the loss of his beasts it must be *case*, and not *trespass*; the difference between trespass and case is, that in *trespass* the plaintiff complains of an immediate wrong, and in *case*, of a wrong that is the consequence of another act, *per Fortescue* justice, and by *Raymond* justice, That distinction is perfectly right, And by the *Chief Justice*, We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion; if the act, in the first instance, be unlawful *trespass* will lie, but if the act is *prima facie* lawful, (as it was in the case at bar) and the prejudice to another is not immediate but consequential, it must be an action upon the *case*; and this is the distinction. 1 *Stran.* 635. *Reynolds v. Clarke*; 2 *Ld. Raym.* 1402. S. C. 8 *Mod.* 272. S. C. that the *per quod* the cattle died, after impounding in trespass, is only aggravation. 1 *Vent.* 54. The only act done by the defendant in this case was the taking and impounding the cattle in the common pound, for doing damage; *this*, the law gave

The differ-
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him authority to do, and he did no other act whatever, and he cannot be charged in trespass for the death of the beast, which was a consequence, and not an immediate malfeasance by the defendant; no man can be a trespasser for a *nonfeasance*; the law gave the six carpenters authority to go into the tavern, but the *not paying* for the wine did not make them trespasses *ab initio*; the taverner might have his action of debt for the wine. 8 Rep. 146, 147. Trespass will not lie for taking an excessive distress, because the entry at first is lawful, the remedy in that case is by the stat. of *Marlbridge*, 2 Stran. 851. 3 Lev. 48. so that it is not every abuse of a distress that makes a man a trespasser *ab initio*.

For the plaintiff it was said, that the justification gives no answer to the putting the cattle so closely together, whereby one died, and therefore the plaintiff ought to have judgment upon the issue found for him on the Not guilty; that it was a misfeasance in the first instance, and made the defendant a trespasser *ab initio*. *Sed non allocatur*.

Curia: The justification is in answer to the whole trespass in the declaration, which is only the taking and impounding; all the rest, as the dying of the beast is only aggravation, if the plaintiff would have insisted that the defendant had abused the distress, he ought to have replied that after the said distress the defendant abused *it so and so*, and have concluded with an averment, and this would not have been a *departure*, because he who abuses a distress is a trespasser *ab initio*, according to the case of *Gargrave v. Smith*, 1 Salk. 221. and *Bagshaw v. Garward*, *Yelv.* 96, 97. Judgment for the defendant *per totam curiam*.

Barwis *versus* Keppel, Esq; C. B.

45 & c. 272.

Cafe for reducing a serjeant of the guards to a common soldier in Germany does not lie at common law, it being out of the King's dominions.

ACTION upon the case, wherein the plaintiff declares, that the defendant at the time, &c. was an officer, *viz.* The second, major in the first regiment of guards, and as such, in the absence of all the superior officers of the said regiment had the command, government, ordering and direction of all the inferior officers and soldiers of the second battalion of the said regiment; and the plaintiff was then and there an inferior officer called a serjeant, and doing duty in the capacity of a serjeant in the said second battalion, and always during his continuance in the same office and service of a serjeant, demeaned himself with great prudence, propriety, honesty and obedience, as well towards his superior officers of the said battalion, as also to the inferiors of the said battalion, and by means thereof had deservedly acquired the good opinion, credit and esteem as well of all the officers and soldiers in the said battalion, as also

of all other persons to whom he was known, and did lawfully and honestly acquire great gains, profits and emoluments by his said office, to his comfortable support; yet the defendant well knowing the premisses, but contriving and maliciously intending to hurt and injure the plaintiff, and to ruin him in his character and fortune, and to deprive him of the good opinion, credit and esteem as well of the officers and soldiers in and of the said battalion, as of the said other persons to whom he was known, and to deprive him of the profits, emoluments and advantages arising to him from his office and station aforesaid, on the 28th day of *September* 1761. *wrongfully, unlawfully and maliciously, and without any reasonable ground or cause whatsoever*, under the false, scandalous and malicious pretence that the plaintiff had before that time behaved himself improperly in his said office and station, and had been guilty of a breach of orders in the exercise thereof, and that the defendant might therefore suspend and remove him from his said office and station, the defendant did then and there suspend and remove, and cause the plaintiff to be suspended and removed from his said office and station of a serjeant, and reduced him, and cause him to be reduced to the post and station of a common soldier in the said battalion, and wrongfully and maliciously kept and continued him, and caused him to be kept and continued so suspended and removed and reduced as aforesaid for a long time, to wit, from thence until the suing out of the original writ of the plaintiff; by means whereof the plaintiff hath during all that time unlawfully and injuriously, and under the false and malicious intent aforesaid, been hindered and prevented from exercising his said office of a serjeant, and his pay thereof, and has been deprived of great gains, profits and emoluments, which otherwise would have accrued and arisen to him therefrom, and is greatly lessened in the good opinion, credit and esteem of all the officers and soldiers in the said battalion, and of the said other persons to whom he was known, to the plaintiff's damage of 1000*l*.

The defendant pleaded Not guilty, and the issue was tried at the sitting after *Hilary* term 1765. at *Westminster* by a special jury before the Lord Chief Justice, when a verdict was found for the plaintiff, damages 70*l*. costs 40*s*. subject to the opinion of the court upon the following case, viz.

That in the year 1760. the plaintiff being one of the serjeants of the second battalion of the first regiment of foot-guards, and the defendant the second major of the said battalion, that battalion was ordered to *Germany* in the service of his Majesty against his enemies then at war with this kingdom, and remained abroad in *Germany* till the end of the war.

Cafe for the
opinion of the
court.

That

That this regiment consisted of three battalions, whereof Lord *Ligonier* was the colonel and commanding officer; that the first, and third battalion remained in *England*, as did also the said colonel Lord *Ligonier*, the lieutenant colonel, and the first major of the second battalion; and the defendant being the second major, was, during the absence of his superior officers, the then commanding officer of the said second battalion in *Germany* for the time being in the army, under his Majesty's commander in chief his *Serene Highness Prince Ferdinand*.

That in *September 1761*. The army being in hourly expectation of a battle, the advanced guard of the enemy being within a small distance of the *English* army, a certain order was given by the said *Prince Ferdinand*, that all deserters from the enemy should be immediately sent to the head quarters without being detained one moment.

That the plaintiff had full notice of such order, and that after such notice of the said order, *viz.* on the—day of *September 1761*. and while the armies were in such expectation of an engagement, three *French* deserters came and surrendered themselves to the plaintiff, then being the serjeant commanding the quarter-guard, who, notwithstanding such order of his *Serene Highness* as aforesaid, detained the said deserters six hours without bringing, or attempting to bring them, oreither of them, to the head quarters, or even making a report of such deserters to the defendant, the then commanding officer of the battalion.

That the plaintiff being a serjeant as aforesaid, and as such a non-commissioned officer of the said regiment, on the 28th of *September 1761*. was duly tried by a regimental court martial for the said offence, which found the defendant guilty of the said charge, and by their sentence ordered him to be suspended from his office of serjeant for the space of one month, and to do the duty and receive the pay of a private soldier during that time.

That by the articles of war no sentence of such court martial is to be executed, till the commanding officer (not being a member of the court martial) shall have confirmed the same; that the defendant then being the commanding officer, and no member of the court martial, did not confirm the sentence of that court, but on the contrary, thinking the sentence of the court martial not a sufficient punishment for an offence of so dangerous a consequence, and while the army so remained in expectation of a battle, made an order in writing under his hand, subscribed at the foot of the said sentence, *viz.* "But as serjeant *Barwis* could not be ignorant of the Duke's " order concerning deserters, and colonel *Keppel* thinking his neglect

“ lest might have been attended with the utmost bad consequences
“ orders that he be broke, and that corporal *Billow* be appointed
“ serjeant in his room.”

That the defendant being such commanding officer of the said battalion, his said orders were executed, and the plaintiff was accordingly removed totally from his office of serjeant, and reduced to the station and pay of a private soldier, and was thereby forced and did perform the duty and receive the pay of a private soldier in the said battalion in *Germany*, and afterwards in this kingdom, until the time of the trial of this issue.

That by articles of war, non-commissioned officers may be discharged as private soldiers, either by order of the colonel of the regiment, or by the sentence of a regimental court martial; that it is generally and universally understood in the army, that the whole power of the colonel devolves, in his absence, on the commanding officer for the time being, and that in fact such commanding officer ranks as colonel, and always acts as such. That by the constant custom and practice of the army, the commanding officer for the time being hath always made serjeants, and broke or reduced them in the same manner as the colonel himself might have done if actually present; that the defendant continued in the said regiment till the 3d of *January* 1762. before which time he was appointed to command an expedition to the *Havannah*, and never returned to the said regiment; that the plaintiff continued in *Germany* till—— at which time he came to *England*; that the plaintiff never complained to any superior officer during the time the defendant remained in *Germany*, or during the time the plaintiff remained with the army in *Germany*, nor after his return to *England*.

The question submitted to the court is, whether under the particular circumstances of this case the plaintiff is intitled to recover in this action?

It was objected for the defendant, that this is in the nature of an action for a malicious prosecution; and unless malice appears upon the state of the case the plaintiff cannot recover; the defendant being the commanding officer, had power to remove the plaintiff (as he did,) who it appears had disobeyed the orders of the commander in chief, and the least malice does not appear in the case; *falsity* and *malice* are the ground and foundation of actions of this kind. 1 *Leon.* 107. and 1 *Lev.* 119. action upon the case for making a false affidavit against the plaintiff, touching a malfeasance in his office, and getting him turned out of it thereby; the falsehood *was* an evidence of the malice, which was the ground of that action. A condemnation of goods, for not entring them and paying duty by

sub-commissioners, was reversed by commissioners of appeal in *Ireland*; an action for a malicious prosecution does not lie against the informer, for the judgment of the sub-commissioners shews there was a foundation for the information and prosecution. *Reynolds v. Kennedy, Mich. 22 Geo. 2. B. R.* upon error from *Ireland*; so in the present case the court martial's sentence shews that the plaintiff disobeyed orders, and that there was a good foundation for the commanding officer to reduce him, without having any falsehood or malice at all (against him); according to the constant practice of the army, as stated in the case.

For the plaintiff it was said, that he had been tried by a court martial, who thought suspension for a month a sufficient punishment for his offence, and therefore it was malicious in the defendant to reduce him absolutely to a private man, and malice being laid in the declaration, the jury have found it to be maliciously done.

Curia: By the act of parliament to punish mutiny and desertion the King's power to make articles of war, is confined to his own dominions; when his army is out of his dominions he acts by virtue of his prerogative, and without the statute or articles of war; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and *flagrante bello*, the common law has never interfered with the army: *Inter arma silent leges*; We think (as at present advised) we have no jurisdiction at all in this case; but if the plaintiff's council think proper to speak more fully to this matter, we are willing to hear him. But plaintiff seeing the opinion of the court against him, acquiesced, and the judgment was for the defendant, *ut audiui*.

In the vacation after this term, the Right Honourable *Charles Lord Camden*, Baron of *Camden Place* in the county of *Kent*, Lord Chief Justice of the court of Common Pleas, was appointed Lord High chancellor of *Great Britain*.

Michaelmas

Michaelmas Term

7 Geo. 3. 1766.

TH E Honourable Sir *John Eardley Wilmot*, Knt. one of the Judges of the King's Bench, was appointed in the last vacation Lord Chief Justice of the court of Common Pleas, and took his place the beginning of this term.

Dickon the younger *versus* Clifton. C. B.

6. M. 385

IN an action upon the case, the plaintiff declares, that whereas he the plaintiff on the 28th day of *August* 1764. at the castle of *York* was owner and proprietor of a certain boat or vessel called a keel, and being so, he afterwards on the same day and year there, at the instance and request of the defendant, retained and employed him in the service of the plaintiff to be master and commander of the vessel, and to receive and take on board thereof from one *Matthew Johnson* at a place called *Brough* in the county of *York*, fifty-six quarters of malt of the plaintiff of the value of 100*l.* and to carry and convey the same by water in the vessel from thence to *Horbury* in *Yorkshire*, and at *Horbury* to deliver the same to one *Jonathan Croftland* for certain wages, hire or reward to be therefore paid by the plaintiff to the defendant as master of the vessel; and although the defendant afterwards on the 29th of *August* in the year aforesaid at *Brough* in *Yorkshire*, had and received from the said *Matthew Johnson* the whole 56 quarters of malt of the plaintiff, and afterwards on the same day and year last aforesaid set sail and departed with the vessel from the said place where he the defendant had so received the malt from *Matthew Johnson*, towards and for *Horbury*; and afterwards on the 21st of *September* in the year aforesaid arrived with the vessel at *Horbury*, and afterwards on the same day and year last aforesaid at *Horbury* delivered to the said *Jonathan Croftland* a part, to wit, forty quarters of the said malt; yet the defendant not regarding the duty of his employment, so badly, carelessly, negligently and improvidently behaved himself in his said employment, and took such little and such bad care of sixteen quarters of malt, residue of the said fifty-six quarters of malt so by him received as aforesaid, that the defendant

Case for a 5 M. 589
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Recognized in
Holland & Bradshaw
Hil. 24. G. 3. B. R.
M. 1. B. 16.

that it objected shd
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is cured by verdict
Luth. 109 - (no Dec. 20
But vide 3 Dec. 99
Bague v Brownell
uct. Lut. 101.

Urd: Brown v Dixon
Lut. 101. 26. G. 3. 274
decided in 2^d autho-
rity of this case a
line laid down
that whenever the
same Plea may be
pleaded a the same
Ind. 1. given in two
counts they may
be joined.

defendant did not deliver the same 16 quarters of malt, or any part thereof, to the said *Jonathan* at *Horbury*, or elsewhere, (although often requested so to do) but the defendant on the contrary thereof by and through his own meer neglect and default, and through his carelessness and improvidence suffered the same, and every part thereof, while the same were, and continued in his possession and custody for such carriage, to be embezzled and wholly lost, to wit, at the castle of *York* aforesaid.

Second count.

And whereas the said plaintiff on the first day of *August* 1764. and from thence until the the first day of *October* in the same year at the castle of *York* was owner and proprietor of another vessel, and the defendant was during all that time master of the same vessel, retained and employed as such by the plaintiff, and in his service to navigate the same from place to place, and to take care of the last mentioned vessel, and of all goods delivered to him as such master, or put on board the same for carriage from place to place, for wages, hire or reward, to be therefore payable and paid by the plaintiff to him as such master of the vessel, to wit, at the castle of *York*; and whereas within the time aforesaid, and while the plaintiff was owner of the last mentioned vessel, and while the defendant was master thereof in the service of the plaintiff, to wit, on the 29th of *August* in the year aforesaid, he the defendant, as master of the same vessel, received from the said *Matthew Johnson*, by order of the plaintiff at *Brough* aforesaid, other fifty-six quarters of malt of the plaintiff of the value of other 100 *l.* to be carried and conveyed by the defendant in the last mentioned vessel to *Horbury* aforesaid by water, to be there delivered to the said *Jonathan Croftland* for the plaintiff; and although the defendant afterwards on the 29th of *August* in the said year had and received from the said *Matthew Johnson* the said whole fifty-six quarters of other malt of the plaintiff, and on the same day and year set sail and departed with the said last mentioned vessel from the said place where he had so received the said malt from *Matthew Johnson*, towards and for *Horbury*, and afterwards on the 21st of *September* in the year aforesaid, arrived with the same vessel at *Horbury*, and afterwards on the same day and year there delivered to *Jonathan Croftland* a part, to wit, 30 quarters of the last mentioned malt; yet the defendant not regarding the duty of his employment, so badly, carelessly, negligently and improvidently behaved himself in his said employment, and took such little and bad care of 16 quarters, residue of the said 56 quarters of malt so by him received as last aforesaid, that the defendant did not deliver the same 16 quarters, or any part thereof, to the said *Jonathan* at *Horbury* or elsewhere, although often requested so to do; but the said defendant on the contrary thereof, by and through his own meer neglect, carelessness and improvidence, suffered the same while it continued in his possession and custody

body for such carriage, to be embezzled and wholly lost, to wit, at the castle of York aforesaid. There is another count in trover for sixty quarters of malt, laid to be the property of the plaintiff, and converted by the defendant to his own use, to the plaintiff's damage of 40*l*. The defendant pleaded the general issue, and there was a general verdict for the plaintiff on all the counts in the declaration.

And now it was moved in arrest of judgment, and objected that the two first counts are in the nature of an action on the custom of the realm, which is founded in *contract*, and therefore cannot be joined with a count in *trover* which is a *tort*. *2dly*, That this action ought to have been laid upon a promise and undertaking, and not being so laid is ill; and to shew that these counts could not be joined, many old cases were cited from *Viner's Abr.* title *Action* (*joinder*.) which the court over-ruled, and therefore shall not be set down here.

Lord Chief Justice *Wilmot*: This motion is after the merits have been tried, and a verdict found for the plaintiff, which the court will support, if possible. It is objected that the first count is laid *quasi ex contractu*, and cannot be joined with trover; supposing it was so, yet I should lay no great stress upon old cases to this point at this day; but I think the first count is laid to be *ex delicto* of the defendant, and as a misfeasance, which may undoubtedly be joined with *Trover*. The true *test* to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment in both, and not whether they both require the same plea, and wherever there is the same judgment in both, I think they may well be joined. I own that in many books it is reported that trover, and a count against a common carrier cannot be joined, but common experience and practice is now to the contrary; this is laid as a *misfeasance* wherein there is the same judgment as in trover, and therefore I am of opinion the plaintiff must have judgment.

Two counts
may be joined
where there is
the same
judgment in
both. *This infra 3 Wils. 357
is said to be too large
tho it may be one of ye
tests*

Chief Justice: The first count is as plainly a tort as trover is; suppose I trust a shepherd with my sheep, and he puts his own dog among them, which worries them, this would be a *tort*, although I contract with him for wages to take care of my sheep, and he undertakes accordingly; and I am of my Lord's opinion, that the true *test*, is to see whether both counts require the same judgment; in *this* case they do, and the plaintiff must have judgment.

Could Justice: I think trover and case against a carrier may be joined notwithstanding what is said in the books. In the case put of the shepherd, he might either be charged upon the contract, or as a wrong-doer; and so might the defendant in the present case; I am of the same opinion for the plaintiff.

*so decided Sup. B.
16. July. 24. G. 3*

Chief Justice: I have a doubt whether *trespass vi & armis* and *trover* can be joined, but think they cannot, because they have different judgments. Judgment for the plaintiff.

Hilary Term

7 Geo. 3. 1767.

3 April. 340

2 B.L.C. 357

Roe, on the demise of George Dodson, Esq; *versus* Grew and others. C. B.

Devise to G. G. for life and after his death to the issue of his body, and heirs of the body of such issue, is an estate-tail in G. G.

Dann & Packer
S. T. R. 299.

Dor & A. C. and W.
v Smith
7. T. R. 531.

EJECTMENT for lands in *Middlesex* tried before Lord *Camden* at the sitting after *Easter* term last; verdict for the plaintiff upon the following case subject to the opinion of the court. The case states, that *Daniel Dodson* being seized in fee of the lands in question, by his will devised the same in these words, *viz.* "I give, devise and bequeath unto my nephew *George Grew*, all my lands (naming and describing them particularly) to hold the same with their appurtenances unto him the said *George Grew*, for and during the term of his natural life, and from and after his decease to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and for want of such issue male, then I give all and every the afore said premises unto my nephew *George Dodson*, his heirs and assigns for ever."

That in the devise to *George Grew*, the words "heirs male of his body" were originally written, but that the word *heirs* was scratched out, and the word *issue* inserted in it's stead, in the same hand with the body of the will, but in different ink.

That *George Dodson*, the devisee in remainder in the will, is the lessor of the plaintiff.

That the testator devised other lands to the lessor of the plaintiff in fee.

That

That *George Grew* and the lessor of the plaintiff were the testator's nephews, and he devised the residue of his estates both real and personal, equally between his said two nephews.

That *George Grew* had no child at the time of making the will; that he entredon the premises in question, and suffered a common recovery thereof, and died without issue male.

The question upon this case is, whether *George Grew* took an estate-tail, or for life only, under the said will?

This case was argued by serjeant *Leigh* for the plaintiff, and serjeant *Burland* for the defendant; after time taken to consider, judgment was given for the defendant by the whole court the 28th of January in this term, that *George Grew* took an estate-tail, and that the lessor of the plaintiff was barred by the recovery.

Lord Chief Justice *Wilmot*: The testator had no issue at the time of the will; his intention is to be followed, provided it does not clash with the rules of law; the statute of wills gives a man power to devise his lands, but he cannot by his will create a perpetuity, nor restrain tenant in tail from suffering a recovery, &c. &c. these being contrary to the rules of law. The intention of the testator clearly was to give *George Grew* an estate for life only, but his intention also clearly was, that all the sons of *George Grew* should take in succession; both these intentions cannot take place, for if the devisee *George Grew* took only an estate for life, his sons could never have taken, and although it eventually happened that he had no sons, yet we must consider this case as if he had had issue; therefore the court must put themselves in the place of the testator, and determine as he would have done, if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been asked which of them he desired should take effect and stand, as both could not, he certainly would have answered, "that, so long as *George Grew* had any issue male, the premises should not go to the lessor of the plaintiff"; and if we balance the two intentions, the weightiest is, that all the sons of *George Grew* should take in succession; and therefore, to enable them to take, *George Grew* must be adjudged to have been tenant in tail, for the testator's great intention most clearly was, that the lands should never go over to the lessor of the plaintiff in remainder, but upon a failure of issue of *George Grew*.

J. Hall 340
Judgment of
the court.

The word *issue* in a will, is either a word of purchase or of limitation, as will best effectuate the intention of the testator; it is a plural word, and takes in all the sons of *George Grew*, and the words "*Issue male of his body and the heirs male of his body of such issue*", *the*
mean

mean only that they were not all to take at a time but in succession, as if he had said *to his first, and every other son, &c.* as to the scratching out the word *heirs*, I lay no stress at all upon that, because the testator's chief and predominant intent was clearly that the lands should go in succession to all the sons of *George Grew*.

Cases in the books upon wills have no great weight with me unless they are exactly in the very point, and there has not one been cited in every thing like this; the intention is the great thing which governs me, which is that *George Grew's* sons should take in succession, which they could not do if he was only tenant for life, and therefore I am of opinion he was tenant in tail, and judgment must be for the defendant.

Clive Justice: The word *issue* is one of the most vexed words in the books; sometimes it is *nomen singulare*, sometimes *plural*, sometimes a word of *limitation*, sometimes of *purchase*, but it must always be construed according to the intent of the will or deed where-in it is used; if one grants to a man and his issue (who has issue at the time of the grant) the issue shall take jointly with him. In the present case the great intention is to give in succession to all the sons of *George Grew*, which cannot be without construing it an estate-tail in him; I think too great regard has been paid to the superadded words "*Heirs male of the body of such issue*", and am of the same opinion with my Lord Chief Justice.

Bathurst Justice: It is a rule, that where an ancestor takes an estate of freehold, if the word *issue* in a will comes after, it is a word of limitation; where there appears a particular intent, and a general intent, the general must take place; the great view here was, that the land should not go over to *Dodson* so long as *Grew* had issue, but that general intent cannot take effect unless *Grew* be tenant in tail; and I am of opinion he was, and agree with my Lord and Brother.

Gould Justice: I am of the same opinion; the word *issue* is used in the statute *de donis* promiscuously with the word *heirs*. The term *issue* comprehends the whole generation, as well as the word *heirs*; and in my judgment the word *issue* is more properly, in its natural signification, a word of *limitation* than of *purchase*. Judgment for the defendant.

Russel *versus* Palmer an attorney. C. B.

*Writ concerning
this case B. R.
2060-3. Pitt in
Galton*

Middlesex, JAMES Russel by Thomas Bennett his attorney, com-
to wit, plains of Charlton Palmer, Gentleman, one of the at-
tornies of the court of our Lord the now King of the Bench here,
present here in court in his own proper person, of a plea of trespass
on the case, for that whereas the said James heretofore in Hilary
term in the fifth year of the reign of our Sovereign Lord the now
King, in the court of our Lord the now King, before the King him-
self the said court then being held at *Westminster* in the said county
of *Middlesex*, by bill without his Majesty's writ recovered against
one John Stewart as well a certain debt of 5322l. 13s. 2d. as 17l.
for his damages which he had sustained as well on occasion of the
detaining of that debt, as for his costs and charges by him expended
about his suit in that behalf, as by the record and proceedings thereof
remaining in the said court of our Lord the now King, before the
King himself at *Westminster* aforesaid more fully and at large ap-
pears, which said judgment still remains in its full force and effect,
not reversed, annulled, set aside, paid or satisfied; and the said James
Russel further saith, that while the said suit was depending in the
said court, to wit, in *Trinity* term in the fourth year of the reign
of our Lord the now King in the said court of our Lord the now
King before the King himself, the said court then being held at
Westminster in the said county of *Middlesex*, came personally Andrew
Grant of King's Arms yard, Coleman-street, London, merchant, and
Robert Bogle of Love-Lane Eastcheap, London, merchant, and then
and there in the said court became pledges and bail, and each of
them by himself became a pledge and bail for the said John Stewart
that if it should happen that judgment in the said plea of debt should
be given for the said James Russell against the said John Stewart,
that then the said John should satisfy the said James Russell the said
debt and all such damages as should be adjudged to the said James
Russel in the said plea, or render himself on that occasion to the pri-
son of the marshal of the *Marshalsea* of our Lord the King before
the King himself, as by the record of the said recognizance remain-
ing in the said court of our said Lord the King before the King him-
self may more fully and at large appear; and the said James further
saith, that after the recovery of the aforesaid judgment (that is to
say) on the eighteenth day of May in *Easter* term in the fifth year
of the reign of our said Lord the now King, before the honourable
Sir Richard Aston, Knight, then one of the justices of our Lord the
now King, assigned to hold pleas in the court of our Lord the now
King before the King himself, the said Stewart rendered himself in discharge
of his bail to the prison of B. R. and there continued till the time of his being superse-
ded.

Special ac-
tion upon the
case against
an attorney
for negli-
gence. The decla-
ration sets forth,
that whereas
the plaintiff in
Hilary term
in the fifth
year of the
King recover-
ed against one
John Stewart
a judgment
for 5322l.
13s. 2d.
debt, and 17l.
costs in B. R.
And while
that suit was
depending, in
Trinity term
in the fourth
year of the
King, A. G.
and R. B. be-
came bail for
said Stewart
in the said
plea of debt.

*est unum
this action is
brought if
two att are
parties
Dutton & Tayl
B. 121.*

3 B. R. 738

That after the
recovery of
the said judg-
ment on the
18th day of
May in *Easter*
term in the
fifth year of
the King be-

That the defendant was retained as attorney for the plaintiff in the said suit.

And that Stewart being so rendered as above, by the rule and practice of B. R. ought to have been charged in execution on or before the last day of Trinity term in the fifth year of the King, to prevent his being discharged.

And the said Palmer still being the attorney of the plaintiff undertook and promised to do his duty, and the plaintiff avers that it was the duty of Palmer to have caused the said Stewart to be charged in execution on or before last day of Trinity term aforesaid.

King before the King himself, at his chambers situate in *Serjeants-Inn, Chancery-Lane*, the said *John Stewart* rendered himself in discharge of his said bail in the said plea at the suit of the said *James Russell*, and was thereupon committed to the prison of the marshal of the *Marshalsea* of our Lord the now King before the King himself, on that occasion at the suit of the said *James Russell*, and there continued in custody of the said marshal in the aforesaid prison, from thence until the time of his being superseded out of custody, as hereafter is mentioned; and the said *James Russell* further saith, that he the said *Charlton Palmer* from the first commencement of the said suit until the discharge of the said *John Stewart* out of the custody of the said marshal hereafter mentioned, was by the said *James Russell* returned or employed as attorney or agent of the said *James Russell* in the said suit, and employed by him as such to prosecute the same suit against the said *John Stewart* for hire and reward, to be paid by the said *James Russell* to the said *Charlton* for his fees, work and labour in that behalf, and that the said *John Stewart* being so surrendered and committed as aforesaid, and so being and continuing in the custody of the said marshal of the *Marshalsea* of our said Lord the King, before the King himself, at the suit of the said *James* in the said plea, by virtue of the said render and commitment thereon as aforesaid, he the said *John Stewart* by the rule and practice of that court ought to have been charged in execution in the said plea, at the suit of the said *James Russell* for the debt and damages aforesaid, in the said court of our Lord the now King before the King himself, on or before the last day of *Trinity* term in the fifth year aforesaid, in order to prevent his the said *John Stewart*'s being discharged out of the said custody, without first paying off or making satisfaction to the said *James Russell*, for the debt and damages aforesaid, of all which said premisses the said *Charlton Palmer* afterwards to wit, on the said eighteenth day of *May* in the fifth year aforesaid at *Westminster* aforesaid had due notice, and the said *Charlton Palmer* still being and continuing agent or attorney of and for the said *James* in the said suit, did then and there undertake and faithfully promise to the said *James*, that he the said *Charlton* the business and duty of such agent or attorney in the said suit would well and faithfully perform and execute; and the said *James* saith, that it was thereupon the business and duty of the said *Charlton Palmer*, as such attorney or agent of and for the said *James Russell* in the said suit, to have caused the said *John Stewart* to be so charged in execution as aforesaid for the debt and damages aforesaid, in the said plea on or before the said last day of *Trinity* term in the fifth year aforesaid, to prevent the said *John Stewart* from being so superseded and discharged as aforesaid, of all which said premisses the said *Charlton* there, to wit, at *Westminster* aforesaid had due notice; and although the said *Charlton* had not any orders or directions from the said *James Russell* to the contrary, yet the said

Charlton

Charlton not regarding the duty or business of his said office and employment of such attorney and agent of the said *James* in the said suit as aforesaid, after that the said *John* was so rendered and committed as aforesaid, to wit, from thence until and on and throughout the said last day of *Trinity* term in the fifth year aforesaid, at *Westminster* aforesaid, so negligently and inadvertently conducted and behaved himself in his said employment, that the said *Charlton* wholly neglected and omitted to cause the said *John* to be so charged in execution as aforesaid, and by means of which said neglect and omission of the said *Charlton* afterwards, to wit, on the 21st day of *November* in *Michaelmas* term in the sixth year of the reign of our Lord the now King, the said *John* was superseded and discharged out of the custody of the said marshal by the said court of our said Lord the now King before the King himself at *Westminster* aforesaid, the debt and damages aforesaid being wholly unpaid to the said *James*, whereby the said *James* hath been wholly hindered and obstructed from obtaining of his debt and damages aforesaid in form aforesaid recovered and hath wholly lost the same, to the said *James* his damage of 3500*l.* and therefore he prays relief, &c. The defendant pleaded the general issue, and the cause having been tried before Lord Chief Justice *Wilmot*, there was a verdict for the plaintiff and 50*l.* damages.

but that he Palmer neglected so to do, by reason whereof Stewart on the 21st of November in the sixth year of the King was discharged by *superfedeas*.

To the plaintiff's damage of 3500*l.*

The plaintiff's declaration fully states his case; for the defendant it was said that the rule of the court of King's Bench made in *Trinity* term in the 2d year of *Geo. 1.* touching this matter, is in very doubtful words, which are thus, *viz.* "If any plaintiff shall obtain judgment in the court here in any action against any defendant a prisoner, and shall not charge the said defendant so in prison remaining, in execution upon the judgment so obtained *within two terms next after such judgment* so had and obtained, then such defendant so in prison remaining shall have leave to file common bail, or to sue out a writ of *superfedeas* for his discharge out of custody"; that from the words of this rule it seems as if the plaintiff had two terms next after, and exclusive of the term wherein judgment was obtained against the prisoner, to charge him in execution; and therefore it was moved on the behalf of the defendant that judgment might be stayed; for two reasons, first, because if the defendant *Palmer* had two terms exclusive of the term wherein judgment was obtained against *Stewart*, and wherein he rendered himself to prison, to charge *Stewart* in execution, then this action is misconceived; and 2dly, although the meaning and construction of the said rule be, that Mr. *Palmer* ought to have caused *Stewart* to be charged in execution, the very next term after the term wherein judgment was obtained against *Stewart*, and wherein he rendered himself, yet the words of the rule are so doubtful, that it can only be considered as an error in judgment in Mr. *Palmer*, and not a negligence

negligence in the duty of his office as an attorney. Upon shewing cause, the Lord Chief Justice reported that several eminent practitioners were examined upon the trial as to the construction and practice upon the said rule, who said that of late years it was well understood, that a person surrendring in discharge of his bail after judgment must be charged in execution the very next term after such surrender; some of them said they believed this was not universally known by the city attornies, and that they thought that it was an omission in Mr. *Palmer* proceeding from want of judgment, and not from any wilful negligence in regard to his client Mr. *Russell*; *John Lambert*, Mr. *Palmer*'s clerk, swore that in all the time he had served Mr. *Palmer*, they never had one render after judgment; that the friends of *Stewart* while he was a prisoner were in treaty about an accommodation with Mr. *Russell* in order to get *Stewart* discharged, that he *Lambert* before the end of *Trinity* term in the 5th year of the King proposed to his master *Palmer* to charge the prisoner *Stewart* in execution, at the suit of the plaintiff *Russell*, but Mr. *Palmer* then informed him (this witness) that the said parties were in treaty for an accommodation, and that he believed the matter would be ended; that upon a summons before Lord *Mansfield*, to shew cause why *Stewart* should not be discharged by *superfedeas*, Lord *Mansfield* thought the said rule did not extend to this case; another eminent practitioner was called for the defendant, and said, that upon a summons before Mr. Justice *Foster* in 1753. upon this very point of practice, that the Judge thought a plaintiff had two terms to charge a prisoner in execution, exclusive of the term wherein the judgment was obtained against the prisoner, and wherein he surrendered himself. There was some evidence that *Stewart* was not totally insolvent, and that *Russell* probably might be able in time coming to obtain some part of his debt by execution against his goods; upon this evidence the jury gave a verdict for the plaintiff, and 500*l.* in damages.

Curia: This cause was first tried before Lord *Camden* about half a year ago, when a verdict was given for the plaintiff for 3000*l.* the whole debt, by my Lord's direction; but afterwards a new trial was granted, my Lord and the court being of opinion that he had misdirected the jury in telling them they ought to find a verdict for the whole debt, whereas this action sounds merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit; and upon the last trial the jury were told they might find what damages they pleased, and accordingly found only 500*l.* as it appeared to them in evidence, that *Stewart* was not totally insolvent. We are all of opinion that this action is well conceived, and lies against Mr. *Palmer* for negligence, and we have authority to say that Lord *Camden* is of the same opinion. Judgment for the plaintiff.

Easter Term

7 Geo. 3. 1767.

Goodright of the demise of Francis Hoole *versus*
Joseph Sales. C. B.

EJECTMENT; of certain messuages or tenements in the county of *Derby*; verdict for the plaintiff as to one messuage in the possession of *Francis Butcher*, part of the premises in the declaration; and as to the messuages in the declaration in the possession of *John Pritchard, Samuel Walton Thomas Hogdkinson and Thomas Clifton, being the residue of the premises in question*; a verdict for the plaintiff, subject to the opinion of the court upon the following case, which states, That *John Cooke* was seised in fee of the said residue of the premises in question, that an indenture of three parts dated the 18th of *December 1751.* was made and executed between *Samuel Crompton*, sole executor of the will of *Abraham Crompton deceased*, of the first part, *John Hoole* of the second part, and *Thomas Sheppard* of the third part, whereby, after reciting an indenture of mortgage which had been before made by the said *Cooke* to the said *Abraham Crompton* of a messuage with the appurtenances in *Sadler Gate* in *Derby* for 500 years, for securing 60*l.* and interest; and also reciting an assignment of such mortgage term from the said *Crompton* to one *Gisborne*, and a re-assignment thereof from the said *Gisborne* to the said *Crompton*, and after reciting that *Cooke* afterwards borrowed of the said *Abraham Crompton* 40*l.* and 10*l.* on his bonds, and deed poll, whereby he also charged the said messuage with the payment thereof, and after reciting that since the making of the said indentures, three new messuages had been erected on part of the said premises, and that *Abraham Crompton* and *John Cooke* were both dead, the said *Samuel Crompton* in consideration of 76*l.* 1*s.* paid him by the said *John Hoole*, and by the appointment of the said *Hoole*, and of 5 *s.* paid him by the said *Thomas Sheppard*, assigned to the said *Sheppard*, his executors, &c. the messuage in *Sadler Gate*, and also the three new built messuages and appurtenances, being the said residue of the premises in question, for the residue of the said term of 500 years, in trust for the said *Hoole*, his executors,

A. being cestuy que trust of a term in Blackacre, afterwards purchases the fee in his own name, and devises Blackacre in fee to his heir, whom he makes executor and residuary legatee, who dies, the term shall go with the fee to the heir, and not to her personal representative.

PART II.

4 P

&c.

&c. but subject to such equity of redemption, as the heirs or assigns of the said *Cooke* had therein.

That by indentures of lease and release (the release *tripartite*) and dated the 11th of *January* 1752. made between *John Cooke*, son and heir of the before named *John Cooke* deceased, *Catharine Jerome*, widow, and *Elizabeth Port*, widow, daughters of the said *Cooke* deceased, of the first part, the said *John Hoole* of the second part, and *Richard Rose* of the third part, in consideration that the said *Hoole* had paid to the said *Crompton* 76*l.* 1*s.* in discharge of the said mortgage, and other considerations, the said *John Cooke*, *Catharine Jerome*, and *Elizabeth Port*, granted and conveyed the said residue of the premises in question to the said *Rose*, his heirs and assigns, to the use of the said *John Hoole*, his heirs and assigns for ever, subject to two annuities of 13*s.* 4*d.* each, to *Catharine Jerome* and *Elizabeth Port* for their lives, both since deceased.

That *John Hoole* being so seised and intitled, received the rents till his death, which happened on the 16th day of *August* 1757. leaving *Mary Launder*, his granddaughter and heir at law, and next of kin, she being the only child of *Mary Launder* (then deceased) who was the only child of the said *John Hoole*.

That on the death of the said *John Hoole* the said *Mary Launder* his granddaughter entred upon and received the rents of the said premises in question up till the time of her marriage with the defendant *Sales*, from which time she, or her said husband in her right, continued in the possession and receipt of the rents and profits of the premises to the time of her death without issue on the 13th day of *March* 1766.

That *John Hoole* made his will dated the 3d of *February* 1756. whereby he devised the messuage recovered in this ejectment, and the residue of the premises in question, and all other his messuages, houses, tenements and real estate whatsoever to the said *Mary* his granddaughter in fee, and appointed her residuary legatee and executrix of his said will, that *Francis Hoole*, the lessor of the plaintiff is nephew and heir at law of the said *John Hoole*, and also heir at law of the said *Mary Sales* on the part of the mother; therefore whether the said *Francis Hoole* the lessor of the plaintiff is intitled to recover the said residue of the premises is the question?

John Hoole being seised in fee, and having this term of years in *Sheppard* in trust for himself, by his will devises all his real estate whatsoever (entire) to his granddaughter his heir at law in fee, and appointed her residuary legatee and executrix; she was *in* of the fee by descent and not by the will; *Sales* her husband produced at the trial

trial the said assignment of the mortgaged term to *Sheppard* in trust for *John Hoole*; it is objected that the lessor of the plaintiff cannot recover because of the subsisting term for years which is in *Sheppard*, in trust for *John Hoole* the testator, who by his will had devised it to his granddaughter, who was his residuary legatee, and therefore the defendant her husband shall have the benefit thereof, and it shall not attend the inheritance, there being no mention made in the assignment thereof to *Sheppard* that it was in *Trust for John Hoole to attend the inheritance*; so whether this term can be set up to bar the plaintiff the heir at law to the fee from recovering possession in this ejectment.

Lord Chief Justice: It is observable there are no creditors in this case to incline a court of law or equity to sever this term of years from the fee; it is a question between the personal representative of the wife under a satisfied mortgage, and her heir at law; when *John Hoole* purchased the fee he became both the hand to receive, and the hand to pay off the mortgage money, it wrought an extinguishment of the debt due on the mortgage, when *Hoole* purchased the fee the mortgaged term was gone, though it did not extinguish the term in point of law, (because that was in *Sheppard*,) yet it became attendant upon the inheritance, and must follow it in point of law, as much as if it had been made to do so by the act of the party *John Hoole* himself.

But it is objected, that although this will is void as to the devise of the fee, yet that the devise will have some effect, because it is evidence that the testator intended to give his granddaughter some interest in his real estate by his will, and if she cannot take the whole fee by devise, why shall she not take part, viz. the term? in answer to this, it is plain he had no intention to sever the term from the fee, but he intended to give her the whole inheritance intire the words are, *All my messuages, &c.* to her and her heirs for ever, not having it in contemplation to divide the term from the fee; and the case of *Whitchurch v. Whitchurch*, 2 Wms. 236. *Gilb. Eq. Cases* 168. S. C. 9 Mod. 124. S. C. is in point; *A.* being possessed of a term of 500 years in *Blackacre* afterwards purchases the fee-simple in *B.*'s name, and devises *Blackacre* to *J. S.* in fee, but if the will is not attested by three witnesses, the term shall not pass, because attendant on and part of the inheritance; the intention of the testator in that case was to give the inheritance; the attendant term could not pass, but was considered as part of the inheritance. It is observable in the present case, there is but a month between the assignment of the mortgage, and the purchase of the fee; it is admitted that if it had been mentioned in the assignment of the term that it was to attend the inheritance, it could not be set up against the heir at law; now I consider such (as much as if it had been so expressed)

pressed) upon legal principles, and it shall not be set up against the heir. *Lit. sect. 464. cestuy que use* at common law was considered as the owner of the land, and was sworn in assizes and other inquests in pleas real and personal; and the feoffee to uses was to make such conveyance or estate as *cestuy que use* directed, or he would have been guilty of a breach of trust; and, by Lord *Hobart*, an action would lie against him at law to recover damages for breach of trust, *1 Vern. 344.* therefore it would be very absurd to sanctify a thing, for which an action would lie at law; for when a trustee accepts of a trust, he agrees in effect, that *cestuy que trust* shall enjoy the land; and it would be against the trust to hinder him from having *that* which is his own by law. The *Postea per totam curiam* must be delivered to the plaintiff.

Knight *versus* Preston. C. B.

Debt upon a bond.
1st Plea, Non est factum.
2d Plea, That the defendant by force and restraint of imprisonment executed the bond.

3d Plea confesses that the bond is his deed.

But that the defendant before the 25th of October 1760. was a fugitive beyond seas at Canada.

DEBT upon a bond for 78*l.* 14*s.* dated the 27th of *November* 1762. The defendant pleads *non est factum*; and 2*dly*, by leave of the court he pleads, and says that he by virtue of the writing obligatory ought not to be charged with the debt, because he says that he at the time of the making the said writing obligatory, was wrongfully and unlawfully imprisoned by the plaintiff and others in collusion with her, and was wrongfully and unlawfully kept and detained in prison, until he through the force and restraint of that imprisonment sealed, and, as his act and deed, delivered the said writing obligatory to the plaintiff; and this he is ready to verify; wherefore he prays judgment if he by virtue of the said writing obligatory ought to be charged with the said debt, &c. And 3*dly*, for further plea by leave of the court he craves *oyer* of the bond, and of the condition thereof, and it is read to him in these words, (to wit) The condition of this obligation is such, that if the above bounden *James Preston*, his heirs, &c. shall and do well and truly pay, &c. unto the said *Elizabeth Knight*, her executors, &c. the sum of 31*l.* 17*s.* of lawful money, &c. with legal interest for the same, at, in or upon the day of demand, then this obligation to be void, or else to remain, &c. Which being read and heard, the defendant says that he cannot deny the said action of the plaintiff, nor but that the said writing obligatory is the deed of the said defendant, nor but that the plaintiff ought to recover her debt aforesaid, together with her damages by her sustained on occasion of the detaining thereof against him the defendant; but he further says, that he the defendant long before, and upon the 25th day of *October* 1760. mentioned in a certain act made at the parliament of our Lord the now King of Great Britain, &c. holden at *Westminster* in *Middlesex* by prorogations, on the 18th day of *November* in the first year of his reign, intituled, An act for relief of insolvent debtors, was abroad and beyond the seas

in foreign parts, to wit, at *Canada* in *North America*, and at the time of the making of that act, and from thence until the surrender and discharge of the said defendant hereafter mentioned, was a person intitled by the said act to return into this kingdom, and to surrender himself to prison as a fugitive, and a person abroad and in foreign parts, on the said 25th day of *October* in the first year aforesaid, and as such to take and receive the benefit of the said act; and thereupon he the defendant, after the making of the said act, and during the continuance of the said act, and within the time limited and appointed in and by the said act for such fugitives to return and surrender themselves to prison, in order to have and take the benefit of the said act, to wit, on the first day of *February* in the year of our Lord 1762. did return from the said foreign parts beyond the seas into this kingdom, in order to and with intent to have and take the benefit of the said act; and the defendant further says, that he, before such time as he so went abroad and beyond the seas as aforesaid, and long before the said 25th day of *October* in the said act mentioned, was indebted unto the said plaintiff in a large sum of money, to wit, the said sum of money in the said condition mentioned, and being so indebted, the plaintiff after the said return of the defendant into this kingdom from the said parts beyond the seas, and before such time as the said defendant had surrendered or could surrender himself to prison, in order to take the benefit of the said act in order and with intent to deprive the defendant of the benefit of the said act impleaded the said defendant for the recovery of the said debt so due and owing from the said defendant before the said 25th day of *October* 1760. to the plaintiff in a certain court of *John* Lord Bishop of *Winchester*, commonly called the *Cheney court*, held before *George Prescod*, Esq; bailiff of the said Bishop of his said court, holden at — in the county of *Southampton*, within the jurisdiction of the court, in a certain plea of trespass upon the case upon promises, and by virtue of the process of that court in the said plea, caused and procured the defendant to be taken and arrested by his body, and to be imprisoned at *Winchester* in the said county of *Southampton*, in a certain prison there called the *Soke Prison*, then and still being the prison of the said court, called the *Cheney Court*, and then caused and procured him to be kept and detained in the said prison, until he the defendant afterwards (to wit) on the said 27th day of *November* 1762. in the declaration mentioned at *Westminster* aforesaid, in order to obtain his release and discharge from the said imprisonment; and by and through the force and restraint of that imprisonment sealed and as his act and deed delivered the said writing obligatory in the said declaration mentioned to the plaintiff; and the defendant further says, that he being discharged from his imprisonment in the

And on the first day of February 1762. returned to take the benefit of the insolvent debtors act. That before the act he was indebted to plaintiff in the sum in the condition, who arrested him and put him in prison for it before he could take the benefit of the act,

where he continued until he executed the bond the 27th of November 1762.

Whereupon being discharged, he on the 21st of February 1763. surrendered him-

self to the King's Bench prison, in order to take the benefit of the act, and on the 31st of March, 1763, he was discharged at the quarter sessions.

said *Cheney Court* prison, did afterwards, to wit, on the 21st day of *February* 1763. in compliance with the said act, and according to the form and effect thereof, surrender himself to *John Aston*, Esq; then and still being marshal of the *Marshalsea* of our Lord the now King, before the King himself, and the Keeper of the prison of the King's Bench mentioned in the said act, in order to take the benefit of the said act, and remained and continued so in custody of the said *John Aston* in the said prison as aforesaid, until the said defendant afterwards, (to wit) at the general quarter-sessions of the peace of our Lord the now King, holden at *Southwark* by adjournment, in and for the said county of *Surry*, on *Thursday* the 31st day of *March* in the third year of our Lord the now King, before certain of the King's justices, assigned to keep the peace, &c. in and for the said county, &c. was duly by virtue of and according to the form of the said act of parliament discharged by the said justices in open court at the said sessions; and this he is ready to verify; wherefore he prays judgment, and that his person may be discharged from the execution of the judgment to be obtained against him by the said plaintiff in this action, according to the form of the said act, &c.

Issue on the
non est fac-
tum
Replication to
the 2d plea.

Demurrer to
the 3d plea.

The plaintiff replies and joins issue upon the plea of *non est factum*; and as to the plea of the defendant by him secondly above pleaded in bar, the plaintiff says, that she by reason of any thing in that plea alledged, ought not to be barred from having her action against the defendant to charge him with the said debt, because she says that the defendant made the said bond in the said declaration mentioned of his own free will, and not through the force and restraint of imprisonment, as the defendant hath above in that plea alledged; and this she prays may be inquired of by the country; and as to the plea of the defendant by him lastly above pleaded in bar, the plaintiff says, that she, by reason of any thing in that plea alledged, ought not to be barred from having execution against the person of the defendant, because she says that the said plea, and the matters therein contained are not sufficient in law, &c. (so demurs generally,) and the defendant joins issue to the country to the replication to the 2d plea; and joins in demurrer as to the third plea.

A short state
of the case,
upon the de-
murrer.

The case upon the demurrer to the defendant's third plea shortly is this: The defendant being a fugitive for a simple contract debt owing by him to the plaintiff before, and on the 25th day of *October* 1760. returned to *England* the 1st of *February* 1760. in order to take the benefit of the insolvent debtors act made in the first year of the King, and before he surrendered himself for that purpose, was arrested by the plaintiff for the said debt, and continued in gaol under that arrest four or five months, until he executed the bond the 27th of *November* 1762. for the payment of the said debt, where-
upon

upon he was discharged from that arrest, and afterwards on the 21st of February 1763. within the time limited by the act he surrendered himself to the King's Bench prison, in order to take the benefit of the said act, and at the quarter-sessions for Surrey on the 31st of March 1763. was discharged; and now the plaintiff has brought this action upon the bond; the defendant confesses the bond, but says it was given to the plaintiff for a large sum of money, to wit, the sum of money in the said condition mentioned, owing to her before the said 25th of October 1760. and therefore he pleads that his person ought to be discharged from any execution against him; upon demurrer to this plea, three exceptions were taken:

1st, That the defendant says he was indebted to the plaintiff in a large sum of money, (to wit) the said sum of money in the said condition mentioned; and that this coming under a *videlicet* is not directly alledged, and therefore is not traversable. But *per curiam*, The office of the *videlicet* is to explain what went before, and where it is not repugnant or contradictory, it is material and traversable. 1 Saund. 170, 118. Hob. 172. Salk. 561. And they held the plea good in this point.

The 2d exception was, That the new bond has extinguished the old debt and therefore the defendant is not intitled to be discharged from the bond, which is a debt created in 1762. As to this point the court seemed to differ among themselves, but gave no opinion.

The 3d exception was, That it appeared that the defendant had been returned from Canada to England above a year, viz. from February 1, 1762 till February 21, 1763. before he surrendered himself; this was held a good exception by the whole court, for the defendant ought to have surrendered himself in a reasonable time, but he laid by, was arrested, and continued in gaol five months, when he might have brought his *habeas corpus*, and been surrendered to a proper prison in order to have taken the benefit of the insolvent debtors act; but instead of doing that he gave this bond; and upon this exception alone, judgment was given for the plaintiff.

Roe,

Roe, on the demise of Thomas Buxton and Mary his Wife, *versus* Thomas Dunt. C. B.

Power under a marriage settlement to give to the children of the marriage, in such shares, &c. and for such estate, &c. and there is but one child of the marriage, such child must have the whole estate which was settled,

EJECTMENT of one messuage and lands in *Hetherfet, Great Melton* and *Little Melton* in the county of *Norfolk*. On the trial thereof at the last summer assizes a verdict was for the plaintiff, subject to the opinion of the court, upon the following case.

Sarah Smith, widow, in the year 1744. was seised in fee of the premises according to the custom of the manor, being copyhold of *Hetherfet Cromwells*, and being so seised, at a court held for the said manor on the 25th of *March* 1746. surrendered the premises to the use of her son *John Smith* and *Elizabeth* his wife during their lives and life of the longer liver of them; and after the decease of the survivor of them, to the child or children, whether male or female, of the said *John Smith* and *Elizabeth* his wife, in such proportion and proportions, and for such estate and estates as the said *John Smith* and *Elizabeth* his wife, or the survivor of them, should by any surrender or surrenders thereof, and according to the custom of the manor; or by his or her last will and testament direct, declare, limit or appoint; and for want of such direction, declaration, limitation or appointment, then to all and every the child and children of the said *John Smith* and *Elizabeth* his wife, and their heirs, equally to be divided between them as tenants in common, and not as jointenants; and for want of such issue, then to the right heirs of the said *John Smith* for ever. *John Smith* and *Elizabeth* his wife were at the same court admitted tenants thereof, to hold the same, according to the uses aforesaid; and the said *John Smith* immediately at the same court surrendered the premises to the use of his last will and testament.

Elizabeth Smith the wife died, and *John Smith* her husband survived her, and by his will duly executed the 19th of *March* 1764. devised as follows, *viz.* "I give and devise unto *Sarah Smith* my daughter and her heirs for ever, when she attains the age of twenty-one years, all my messuages, lands, tenements and hereditaments whatsoever, situate, lying and being in *Hetherfet* aforesaid; and if my said daughter *Sarah* shall depart this life before she attain the age of twenty-one years, then I give and devise the said messuages, lands, tenements and hereditaments, unto my sister *Ann Dunt*, the wife of *Thomas Dunt* of *Hetherfet* aforesaid; mason, and her heirs for ever, subject nevertheless to the condition following, that is to say, in case my said sister *Ann* shall at any time when she is possessed of the said messuages and lands, make sale thereof to any person or persons, then my will is, that the

" the said *Ann* my sister do pay to *Samuel Smith* my brother, the
 " sum of fifty pounds out of the money arising by such sale.

John Smith died in *May* 1764. and left only one child his daughter *Sarah Smith* by his said wife *Elizabeth*, who on her father's death took possession of the premises, and died seised thereof on the 4th of *August* 1765. an infant of the age of 19 years and 38 days; and *Mary* the wife of the lessor of the plaintiff; *Thomas Buxton* is the cousin and heir at law of *Sarah* the infant, as being the only child and daughter of *Thomas Smith*, the eldest uncle of *Sarah* the infant, and granddaughter and heir of *Sarah Smith* mentioned as the surrenderer in the surrender of the 25th of *March* 1746. and *Thomas Dunt* the defendant, is husband of the said *Ann Dunt*, the sister and devisee of the testator: the question for the opinion of the court is, whether the plaintiff, as lessee of *Thomas Buxton* and *Mary* his wife, in right of the said *Mary*, as heir at law to *Sarah Smith* the infant, is intitled to recover in this ejectment.

The whole court were clearly of opinion that *Smith* the testator had no power or authority to make the will and surrender as above, but that there being only one child of the said testator by his late wife, that child was intitled to the whole of the premises in fee; and *Mrs. Buxton* being her heir at law, the lessor of the plaintiff had judgment.

N. It was said by the Lord Chief Justice, that he had known a case where there has been one child only, that that child under such a power, as *this*, had been made tenant for life, with remainder in tail to its issue, but he much doubted whether it could be legally done. He said he thought a single child in such a case as this might be made tenant in tail. But *quære*, as to this matter.

This case of *Roe, on the demise of Buxton and his wife, v. Dunt*, was argued by serjeant *Foster* for the plaintiff, and serjeant *Whitaker* for the defendant. The principal case cited and relied upon on the part of the plaintiff was, *Doe, on the demise of Brownsmith and his wife v. Denny* in B. R. Hilary term 29 Geo. 2. in which *Rider C.* Justice delivered the opinion of the whole court. The case was this: By indentures of lease and release of the 23 and 24 of *June* 1727. between *Mary Hammond* of the first part, *Henry Tampion* of the second part, and *James Hailes* and *Samuel Dynes* of the third part, reciting that a marriage was then intended to be had between the said *Henry* and *Mary*. In consideration of the said intended marriage, they the said *Henry* and *Mary* release and convey unto the said *Hailes* and *Dynes* and their heirs, the premises in question, lying in *Swilland* in the county of *Suffolk*, then the estate in fee of the said *Mary*, and also a certain other estate in *Somersham*, then the estate in fee of the

Doe v. Denny
 B. R. Hil.
 29 Geo. 2.
 the like case.

said *Henry*, to the uses following, viz. As to the premises in *Swil-*
land (being the premises in question,) to the use of the said *Mary*
 in fee until the marriage, and as to the premises in *Somersham*, to
 the use of *Henry* till the marriage; and after the marriage, then, as
 to the said estates as well of the said *Mary* as of the said *Henry*, to
 the use of the said *Henry* for life, and after his decease, to the use of
 the said *Mary* for life in bar of dower, and after the decease of the
 survivor of them, to the use of such child or children, on the body
 of the said *Mary* by the said *Henry* to be begotten, and for such
 estate and estates, and subject to such powers, provisoes, conditions
 and limitations, as the said *Mary*, notwithstanding her coverture,
 should by any writing under her hand and seal, attested by three or
 more credible witnesses, or by her last will and testament in writing
 so attested, should limit, direct and appoint the same; and for want
 of such limitation, &c. To the use of such child or children on the
 body of the said *Mary* by the said *Henry* to be begotten, and his and
 their heirs equally, as tenants in common, and not as jointenants;
 and for want of such issue, to the use and behoof of such person and
 persons, and for such estate and estates, &c. as the said *Mary* during
 her coverture, or at any other time and as well married as sole, shall
 in and by her last will and testament, or by any deed duly executed
 in the presence of three or more credible witnesses give and appoint
 the same, and as the estate and estates so to be appointed (if any such
 shall happen to be) shall respectively end and determine; and for
 want of such gift and appointment, the premises (in question) in
Swilland to the right heirs of the said *Mary*, and the premises in
Somersham to the right heirs of the said *Henry*. The marriage took
 effect, and they had issue, only one son *Henry*; the husband died in
 1729. leaving his widow and the son an infant; afterwards in 1733.
Mary the wife died, leaving her said son an infant, but before her
 death made her will in due form, and therein (reciting her power
 under the said marriage settlement) by virtue of the settlement afore-
 said, and of other powers in her vested, (as it is expressed in the will)
 gives and devises unto the said *Henry Tampion* her son and his heirs
 for ever, all the said premises in *Swilland* and *Somersham*; but in
 case her said son shall die before his age of 21 years and without
 issue, then she gives the *Swilland* estate to her brother *Joseph Clarke*,
 and to her sister *Ann Proctor*, and to their heirs for ever as tenants
 in common; and on the like contingency she gives the premises
 in *Somersham* to *Robert Shearcroft* and *John Hailes* and their heirs as
 tenants in common. *Henry Tampion* the infant son survived his mo-
 ther about five years, and died in 1738. an infant and without issue.
 The wife of *Brownsmith* the plaintiff's lessor is heir at law to the
 infant on the part of his father. And the defendant *Denny* claims
 under the will of *Mary* the widow. Lord Ch. Justice *Rider* decla-
 red, that it was the opinion of the whole court and of the late Chief
 Justice *Lee*, that the title was in the heir at law of the infant, and

that the devise by *Mary* was void, and that there being a son living at the time of the mother's appointment, the appointment was void; for as there was issue living at the time of her death, the second power to give it to a stranger could never arise, for she had no power to dispose of it to a stranger, but upon failure of issue; if indeed (said the Chief Justice) the son had died in the life-time of the mother without issue, then perhaps she might have had the power of disposing of it agreeable to the case of *Holt* and *Burleigh* in *Chancery Precedents* 293. 2 *Vern.* 65. (which was like our case, but the child died in the life-time of the parent,) as she had a son living, she could not dispose of the estate from him, nor alter his estate, and gave judgment for the plaintiff. Upon the authority of this case, the present case at bar of *Roe* and *Dunt* was determined, and judgment given for the plaintiff by the whole court, *May* 13, 1767. *Per Wilmot* Ch. Justice, who said that the case cited was directly in point, and that he could not distinguish one from the other; but he thought the case at bar was a stronger case, for if this power could have taken place, and the child had died under 21 and left issue, that issue would have been disinherited.

Catherine Turner, spinster, *versus* Thomas Vaughan.
C. B.

DEBT upon a bond dated the 23d of *March* 1764. for 250*l.* The said *Thomas* by *Matthew Coulthurst* his attorney, comes and defends the wrong and injury when, &c. and prays *oyer* of the said writing in the declaration mentioned; he also prays *oyer* of the condition of the said writing, and it is read to him in these words, (to wit) Now the condition of this obligation is such, that in consideration of cohabitation had by the said above bounden *Thomas Vaughan* with the said *Catherine Turner*, he the said *Thomas Vaughan* hath hereby agreed to secure to the said *Catherine Turner* during her natural life, the yearly sum of 30*l.* a year, to commence from the day of the date of these presents, and made payable on the four most usual feasts or days of payment in the year, (that is to say) the birth of our Lord Christ, the annunciation of the blessed Virgin *Mary*, the nativity of Saint *John* the Baptist, and St. *Michael* the Archangel, by even and equal portions; the first payment to begin and be made on the feast day of St. *John* the Baptist next ensuing the date of the above written obligation; now if the above bounden *Thomas Vaughan*, his heirs, executors, administrators or assigns, pay or cause to be paid to the said *Catherine Turner*, her executors, administrators or assigns, the said annuity or yearly sum in the manner and on the days and times aforesaid, then this obligation to be void, or else to remain in full force and virtue; which being read and heard, the said *Thomas* saith that the declaration aforesaid, and the

4 B2d 650

Bond to a lady in consideration of past cohabitation is good in law. 6 B46 133

Oyer of the condition.

Demurrer.

matter

matter therein contained, is not sufficient in law to maintain the said action of the said *Catharine* against the said *Thomas*; to which said declaration the said *Thomas* need not, nor is he in any way bound by the law of the land to answer; and this he is ready to verify; wherefore for want of a sufficient declaration, the said *Thomas* prays judgment of the said declaration, and that the same may be quashed, &c.

Joinder in demurrer.

And the said *Catharine* saith, that by any thing by the said *Thomas* above alledged, the declaration of her the said *Catharine* ought not to be quashed, because she saith that the declaration aforesaid, and the matter therein contained, are sufficient in law to maintain the said action of the said *Catharine* against the said *Thomas*, which said declaration, and the matter in the same contained, she the said *Catharine* is ready to verify and prove, as the court shall award; and because the said *Thomas* doth not answer to the said declaration, nor doth otherwise gainsay the same, she the said *Catharine* prays judgment and her said debt, together with her damages, occasioned by the detaining of that debt, to be adjudged to her, &c. But because, &c.

It was objected, 1st, That it appeared by the condition of the bond that it was executed and given upon an illegal, flagitious consideration of having cohabited with the plaintiff, who appears to be a spinster, being so named in the declaration, and therefore the court would not assist her to recover any debt thereupon; and cited the *Digest*, Lib. 45. sec. 123. and *Cicero de Senectute* 12. where he explains the word *flagitium* to mean *stuprum*, (thus,) *Stupra & adulteria & omne tale flagitium nullis aliis illecebris excitantur nisi co-luptatis*; and *Cic. Verr.* 5, 10. *Noctis longitudo stupris & flagitiis conturbatur.* 2^{dly}, That this bond appears to be given for a consideration *past*, and therefore is no consideration at all; and cited 1 *Roll. Abr.* 11, 12. *Moore* 642, 643. S. P. 2 *Stran.* 933. S. P.

Judgment for the plaintiff.

Per Clive, Bathurst, and Gould Justices, absente capitali justic Wilmot) without hearing the other side, there must be judgment for the plaintiff.

Clive Justice; I am in a court of Common Law, and not in an Ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good; suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a court of equity it would be postponed to creditors. Sir *Joseph Jekyll*, Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and where it is *præmium pudoris* a court of equity will not relieve against such

such a bond. This condition is incapable of an explanation to make the bond an illegal act.

Bathurst Justice: Where a man is bound in honour and conscience, God forbid that a court of law should say the contrary; and wherever it appears that the man is the seducer, the bond is good. *Bracton* says, when a man cohabits with an unmarried woman it is *legitima concubina*, and *Exodus cap. 22. v. 16. If a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife.* See also *Deuteronomy cap. v. 28.* 29. "If a man find a damsel that is a virgin which is not betrothed, and lay hold on her, and lie with her, and they be found, then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife, because he hath humbled her, he may not put her away all his days." Honour and conscience ought to bind every man in point of law. In an action in the King's Bench upon a promise of marriage, the evidence upon the trial was, that the defendant had bragged and boasted that he had debauched the plaintiff, by promising her marriage; this cause being tried before me in the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 500*l.* damages, which I thought right; the court of King's Bench approved of my opinion, refused to set aside the verdict, and thought 500*l.* damages were little enough.

Could Justice: The court may take this for a lawful and conscientious consideration; we must presume that the defendant hath done what in honour and conscience he ought to have done, and that he thought himself a wrong-doer, and gave the plaintiff this bond to make her amends.

Collins *versus* Blantern. C. B.

This record is of Hilary term in the seventh year of the reign of King George the third. Roll 326.

62B308

Shropshire, **R**OBERT Blantern late of Rodenburst in the said county, yeoman, was summoned to answer *Edward Collins* of a plea, that he render to him seven hundred pounds which he owes to and unjustly detains from him, &c. Whereupon the said *Edward Collins* by *John Leake* his attorney says, that whereas the said *Robert Blantern* on the sixth day of *April*, which was in the year of our Lord 1765. at *Rondenburst* aforesaid in the county aforesaid, by his certain writing obligatory acknowledged himself to be held and firmly bound unto the said *Edward Collins* in the aforesaid sum of seven hundred pounds, to be paid to the said *Edward Collins*

Debt upon a bond for 700*l.* dated the 6th day of April 1765.

PART II.

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lins when he should be thereunto required; nevertheless the said *Robert Blantern* (although often thereunto required) hath not paid the said seven hundred pounds to the said *Edward Collins*, but hath hitherto refused and still doth refuse to pay the same to the said *Edward Collins*, wherefore he says that he is the worse, and hath damage to the value of ten pounds, and therefore he brings suit, and so forth; and he brings here into court the aforesaid writing obligatory, which testifies the said debt in form aforesaid, the date whereof is the same day and year abovementioned.

1st Plea sets forth oyer of the obligation, wherein four others with the defendant were jointly and severally bound to the plaintiff in 700l.

And also oyer of the condition for the payment of 350l. to the plaintiff on the 6th of May next.

Non est factum pleaded.

And the said *Robert*, by *George Greene* his attorney, comes and defends the wrong and injury, when, &c. and craves oyer of the said supposed writing obligatory, and it is read to him in these words, (to wit. Know all men by these presents, that we *John Walker* of *Foston* in the county of *Stafford*, yeoman, *Thomas Walker* of *D'aycott* in the *Moors* in the said county of *Stafford*, yeoman, and *Robert Plantern* of *Rodenburst* in the county of *Salop*, yeoman, are held and firmly bound to *Edward Collins* of *Brecond* in the said county of *Stafford*, surgeon, in the sum of seven hundred pounds of good and lawful money of *Great Britain*, to be paid to the said *Edward Collins*, or his certain attorney, executors, administrators or assigns; for which payment, to be well and faithfully made, we bind ourselves and each and every of us jointly and severally, our and each and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals; dated this sixth day of *April* in the fifth year of the reign of our sovereign Lord *George* the third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, King, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and sixty-five; he also craves oyer of the condition to the said supposed writing obligatory, and it is read to him in these words, to wit, The condition of this obligation is such, that if the above bounden *John Walker*, *Thomas Walker*, and *Robert Blantern*, our heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above named *Edward Collins* his executors, administrators or assigns, the full sum of three hundred and fifty pounds of good and lawful money of *Great Britain* upon the sixth day of *May* next, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue; which being read and heard, the said *Robert* saith that the said *Edward* ought not to have his aforesaid action thereof against him the said *Robert*, because he says that the said supposed writing obligatory is not his deed, and of this he puts himself upon the country, &c. And for further plea in this behalf the said *Robert*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *Edward* ought not to have his aforesaid

said action thereof against him, because he says that before, and at the time of the making of the abovementioned supposed writing obligatory, and also before and at the time of the making of the promisory note hereafter mentioned, (to wit) at *Rodenburst* aforesaid, the said *John Walker* and *Thomas Walker* in the said supposed writing obligatory named, and also one *Robert Walker*, one *Thomas Scillette*, and one *John Cullick*, stood respectively indicted in a due course of law on the prosecution of one *John Rudge*, by five several and respective indictments for wilful and corrupt perjury, to which said several and respective indictments, the said *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillette*, and *John Cullick*, had respectively pleaded the several pleas of Not guilty before the making of the said supposed writing obligatory, and also before the time of the making of the said note hereafter mentioned; and the traverses of the said *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillette*, and *John Cullick* respectively on the respective indictments were, at the time of the making of the unlawful, wicked and corrupt agreement hereafter mentioned, and of the note hereafter mentioned, and also of the above supposed writing obligatory, (to wit) on the day whereon the said supposed writing obligatory was made about to come on to be tried at the assizes then, (to wit) on that day being, and continuing to be held at *Stafford* for the county of *Stafford*, and that the said *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillette*, and *John Cullick*, so standing indicted on the prosecution of the said *John Rudge*, and the said traverses so being about to be tried as aforesaid, it was on the said sixth day of *April* in the year 1765. in the said writing obligatory mentioned, (to wit) at *Rodenburst* aforesaid, unlawfully, wickedly and corruptly agreed by and between the said *John Rudge*, the prosecutor of the indictments aforesaid, the said *Edward Collins* the plaintiff, and the said *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillette*, and *John Cullick*, the defendants in these respective indictments, that the said *Edward Collins* the now plaintiff should give to the said *John Rudge* the prosecutor of the indictments aforesaid, his note in writing, commonly called a promisory note, as and for value received, to bear date on a certain day and in a certain year now past, (to wit) on the day and year last mentioned for a large sum of money, (to wit) the sum of three hundred and fifty pounds, payable to the said *John Rudge* thereafter, (to wit) one month after the date thereof, as a consideration for his the said *John Rudge*'s not appearing to give evidence as prosecutor on the trial of any or either of the traverses aforesaid, against any or either of the defendants, and that in consideration thereof the said *John Rudge* should not, nor would appear at the trial of the traverses aforesaid as prosecutor, and should not, nor would give evidence on any or either of the said indictments

zdy, The defendant pleads, that before and at the time of making the bond, and the note after mentioned, two of the obligors *John* and *Thomas Walker* and three others, stood indicted by *John Rudge*, on 5 indictments for wilful and corrupt perjury, and had severally pleaded Not guilty before the making the bond and note. And the several traverses on the indictments were at the time of making the unlawful agreement after mentioned, and the note and the said bond, viz. on the same day the bond was made, were about to come on to be tried at *Stafford*.

Whereupon it was then corruptly agreed between *Rudge* the prosecutor, the plaintiff, and the 5 persons indicted, that the plaintiff, should give the prosecutor *Rudge* his note for 350l. said traverses.

in consideration for not appearing to give evidence at the trial of the

And that the obligors should execute the bond to the plaintiff of the same date of the note as an indemnity to the plaintiff for giving such note.

That plaintiff gave to Rudge the prosecutor the note for 350 l.

for not appearing as prosecutor and giving evidence.

And that the obligors on giving the note executed this bond

as an indemnity to the plaintiff for giving such note.

against any or either of the parties so standing indicted as aforesaid, and that the said *John Walker*, *Thomas Walker*, and *Robert Blantern* the now defendant, should seal, and as their deed deliver unto the said *Edward Collins*, their bond or obligation of the same date with the said note in the penal sum of seven hundred pounds, with a condition thereunder written, for the payment of three hundred and fifty pounds on the sixth day of *May* then next and now elapsed, as an indemnity to him the said *Edward Collins* for the giving of such note; and the said *Robert Blantern* further saith, that in pursuance and in part of performance of the said unlawful, wicked and corrupt agreement, the said *Edward Collins* did then and there, before the trial of the said traverses, or of any or either of them, (to wit) on the said sixth day of *April* in the year 1765. aforesaid, at *Rodenburst* aforesaid, make, give and deliver unto the said *John Rudge* his certain note in writing, commonly called a promisory note bearing date as aforesaid, (to wit) on the day and in the year last mentioned, for the sum of three hundred and fifty pounds, as for value received, payable to the said *John Rudge* thereafter (to wit) one month after the date thereof, according to the tenor and effect of the agreement aforesaid, as a consideration for his the said *John Rudge*'s not appearing as prosecutor, and for his not giving evidence as prosecutor on the trial of any or either of the traverses aforesaid against any or either of the parties so indicted as aforesaid, and that in pursuance of the said unlawful, wicked and corrupt agreement, and according to the tenor and effect thereof, the said *John Rudge* then and there accepted, had and received the said note of and from the said *Edward Collins* for the purpose aforesaid, and in part of performance of the aforesaid unlawful, wicked and corrupt agreement; and that in further pursuance and completion of the said unlawful, wicked and corrupt agreement, and according to the term and effect thereof, the said *John Walker*, *Thomas Walker*, and *Robert Blantern* the now defendant, did then and there immediately after the giving of the said note, and before the trial of the traverses aforesaid, or of any or either of them, (to wit) on the said sixth day of *April* in the year 1765. aforesaid seal, and as their deed deliver unto the said *Edward Collins* the said writing now brought here into court with the condition above specified, as an indemnity to him the said *Edward Collins* for the giving of such note so given for the cause aforesaid; and the said *Robert Blantern* further saith, that the said *Edward Collins* then and there at the time of the giving of the said note to the said *John Rudge* well knew for what cause and consideration the same was so given, and that the said *Edward Collins*, at the time of the sealing and delivering to him of the writing now brought here into court, took, accepted and received the same of and from the said *John Walker*, *Thomas Walker* and *Robert Blantern* the now defendant, as an indemnity against the aforesaid note, with this, that the said *Robert Blantern* doth aver, that the said supposed writing obligatory now

now brought here into court was given for such consideration as aforesaid, and no other whatsoever, and that he the said *Robert Blanter* and the said *John Walker* and *Thomas Walker* mentioned in the said supposed writing obligatory were not, nor were, or was any or either of them, at the time of the making of the aforesaid note, or at the time of the sealing or delivering of the said supposed writing obligatory to the said *Edward Collins*, or at the time of his acceptance of the said supposed writing obligatory, in any wise indebted to the said *Edward Collins*, or to the said *John Rudge* in any sum of money, or in any other respect whatsoever, and so the said *Robert Blanter* saith that the said supposed writing obligatory so made and given by them the said *Robert Blanter*, *John Walker* and *Thomas Walker* for the cause aforesaid is void in law, and this he is ready to verify, wherefore he prays judgment if the said *Edward Collins* ought to have his aforesaid action thereof against him, &c. And for further plea in this behalf, the said *Robert Blanter* by like leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said *Edward* ought not to have his aforesaid action thereof against him, because he says that the said supposed writing obligatory was given by the said *Robert Blanter*, *John Walker* and *Thomas Walker* to the said *Edward* (to wit) at *Rodenburst* aforesaid, to indemnify the said *Edward* against a certain note in writing of the said *Edward's*, commonly called a promissory note, then (to wit) on the said sixth day of *April* in the year 1765. aforesaid to wit, at *Rodenburst* aforesaid, given by the said *Edward Collins* to the said *John Rudge*, as for value received, bearing date on a certain day and in a certain year now past, to wit, on the day and year last aforesaid, whereby the said *Edward* promised to pay to the said *John Rudge* a certain sum of money, to wit, the sum of three hundred and fifty pounds, as for value received, at a certain time thereafter, to wit, one month after the date of the said note, which said note still remains unpaid, and that the said *Edward Collins* hath not been in any wise damnified by means of the said note, or of the giving of the same; and this the said *Robert Blanter* is ready to verify; wherefore he prays judgment if the said *Edward* ought to have his aforesaid action thereof against him, &c. *John Glynn.*

An averment that the bond was given for the said consideration, and no other;

and that the obligors were not indebted to the plaintiff, and therefore the bond is void in law, et hoc, &c.

3d Plea, that the bond was given by the obligors to indemnify the plaintiff against a note given by him to the prosecutor, and that the plaintiff has not been damnified by the note, & hoc, &c.

And the said *Edward Collins*, as to the said plea of the said *Robert* by him first above pleaded in bar, and whereof he hath put himself upon the country, says, that he the said *Edward* doth the same likewise; and the said *Edward*, as to the said plea of the said *Robert* by him secondly above pleaded in bar, says that he, by reason of any thing by the said *Robert* above in that plea alleged, ought not to be barred from having and maintaining his said action against the said *Robert*, because he says that the same plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said *Edward* from having his

Replication and issue to the 1st plea.

Demurrer to the 2d plea.

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Demurrer to
3d plea.

said action against the said *Robert*, to which said plea, in manner and form above pleaded, the said *Edward Collins* hath no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said *Edward Collins* prays judgment and his debt aforesaid, together with his damages, by occasion of the detaining that debt, to be adjudged to him, &c. and the said *Edward Collins*, as to the said plea of the said *Robert* by him lastly above pleaded in bar says, that he by reason of any thing, by the said *Robert* above in that plea alledged, ought not to be barred from having and maintaining his said action against the said *Robert*, because he says that the same plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said *Edward* from having his said action against the said *Robert*, to which said plea, in manner and form above pleaded, the said *Edward Collins* hath no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said *Edward Collins* prays judgment, and his debt aforesaid, together with his damages, by occasion of the detaining that debt, to be adjudged to him, &c.

G. Nares.

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demurrer.

And the said *Robert* saith that the said plea by him the said *Robert* secondly above pleaded in bar, in manner and form as the same is above pleaded, and the matters therein contained, are sufficient in law to bar the said *Edward* from having his said action against the said *Robert*, which said plea, and the matters therein contained, he the said *Robert* is ready to verify and prove, as the said court shall award; and because the said *Edward* hath not in any manner answered thereto, nor in any wise denied the same, he the said *Robert* prays judgment, and that the said *Edward* may be barred from having his said action thereof against him the said *Robert*, &c. and because the justices here will advise of and upon the premises before that they give judgment thereupon, day is given to the parties aforesaid here until to hear their judgment thereupon, so that the said justices here are not yet ready to give judgment thereon; and the said *Robert* further saith, that the said plea, by him the said *Robert* lastly above pleaded, in bar and manner and form as the same is above pleaded, and the matters therein contained, are sufficient in law to bar the said *Edward* from having his said action against him the said *Robert*, which said plea, and the matters therein contained, he the said *Robert* is ready to verify and prove, as the court shall award; and because the said *Edward* hath not in any manner answered thereto, nor in any wise denied the same he the, said *Robert* prays judgment, and that the said *Edward* may be barred from having his said action thereof against him the said *Robert*, &c.

John Glynn.

And

And because the justices here will advise of and upon the premisses before that they give judgment thereupon, day is given to the parties aforesaid here until to hear their judgment thereupon, for that the said justices here are not as yet ready to give judgment thereon; and in order to try the issue between the parties aforesaid above joined to be tried by the country, the sheriff is commanded that he cause to come here in eight days of the purification of the blessed *Mary* twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

Collins versus Blantern. C. B.

THIS case was well argued last *Hilary* term by serjeant *Nares* for the plaintiff, and serjeant *Glynn* for the defendant, and in this term by serjeant *Burland* for the plaintiff, and serjeant *Jephson* for the defendant.

4 Bk C 187. 9 Bk 462

6 Bk 146. 11 Bk 912

2 Bk 544

On the side of the plaintiff it was insisted that the condition of the bond being singly for the payment of a sum of money, the bond is good and lawful; and that no averment shall be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, and therefore that the special plea is bad; upon the first argument these cases were cited for the plaintiff, *Carth.* 252. *Comb.* *Thompson v. Harvey*, *Lady Downing v. Chapman* C. B. *Mich.* 6 Geo. 2. (now depending in error in B. R.) 1 *Leon.* 73, 203. *Jen.* 106. *Carth.* 300. *Comb.* 245. *Emtson v. Batburst*, 1 *Mod.* 35. *Hutton* 52. *Vent.* 331. *Cro. Jac.* 248.

For the defendant it was insisted, that the averment of the wicked and unlawful consideration of giving the bond, might well be pleaded, although it doth not appear upon the face of the deed; and that any thing which shews an obligation to be void, may well be averred, although it doth not appear on the face of the bond, as *duress*; that it was delivered as an *escrow* to be delivered upon a certain condition to the obligee; *infancy*, *coverture*, or upon a *simoniacal contract*, *maintenance*, &c. and although it is said, there is a difference between bonds being void at common law, and by statute, yet it is otherwise, for the common law was originally by statutes which are now not in being; the general rule that you cannot plead any matter *dehors* the deed, doth not apply to this case; the true meaning of that rule is, that you cannot alledge any thing inconsistent with and contrary to the deed, but you may alledge matter consistent with the deed; the bond in the present case is for the payment of money; The plea admits this, and the averment alledges upon what consideration that money was to be paid, and therefore is not inconsistent or contradictory to the condition of the bond; this

this rule of pleading applied to the cases of *simony*, *duress*, *coverture*, *infancy*, &c. is on the side of the defendant in this case. In bonds not to follow a trade the defendant may aver the consideration to avoid the bond. *Downing v. Chapman* is not like this case, that was an averment contradictory to the condition of the bond, and amounted to a defeasance, the present condition is consistent with the condition, which is for payment of money, and only shews the bad consideration upon which the money was to be paid.

Upon the first argument the Lord Chief Justice broke the case, and said that this was very different from the case of *Lady Downing v. Chapman*, and therefore he would consider it wholly independent thereof; and said, as he was then advised, he thought there was no difference between an act being void by statute or by the common law, that the principle the judges heretofore have gone upon for making the distinction (in the books) is not a sound one; for wherever the bond is void at law or by statute, you may shew how it is void by plea, and that in truth it never had any legal existence. That the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time, all our law began by consent of the legislaturer, and whether it is now law by usage, or writing, it is the same thing; a statute says such a thing shall be avoided by plea, why therefore may not a deed executed upon a consideration against the common law be avoided by plea? In *duress*, *simony*, *infancy*, *coverture*, &c. the plea discloses that in truth there never was any obligation. The principle, upon which courts of justice must go upon, is, to enforce the performance of contracts not injurious to society; and it would be absurd to say that a court of justice shall be bound to enforce contracts injurious to, and against the publick good. No man shall come into a court and say, "give me a sum of money which I desire to have contrary to law"; there can be no doubt but that the compounding a prosecution for wilful and corrupt perjury is a very great offence to the public, and whether it was between some persons who are strangers to this action, it is not material.

Dr & Stud.

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2 Vent. 107.
Godb. 29.

Bathurst Justice (upon breaking this case), said, that the case of *Lady Downing v. Chapman* was not like it.

Gould Justice (upon the breaking this case) said, that he differed with the rest of the court in the judgment given in *Lady Downing v. Chapman*, and that upon the whole of that case he thought the averment that the bond *there* given was upon a wicked consideration, ought to have been admitted; he said that if this case at bar had been upon a simple contract, the court would not have hesitated a moment, but would have given judgment that it was bad; and shall the court sanctify a deed made upon a wicked consideration because

because it is sealed? To have a deed which ought to be for a man's good turned to evil purposes, he thought very wrong, and that there was no distinction, whether a deed be void at law, or by statute.

Upon the second argument of the case at bar in this term, the Lord Chief Justice delivered the opinion of the whole court (and pronounced judgment for the defendant) to the following effect.

Lord Chief Justice *Wilmot*: Four questions are to be considered:

1st. Whether it doth not appear from the facts alledged in the second plea, that the consideration for giving the bond is an illegal consideration?

2^d. Whether a bond given for an illegal consideration, is not clearly void at common law *ab initio*?

3^d. Supposing the bond is void, whether the facts disclosed in the plea to shew it void, can, by law be averred and specially pleaded?

4th. If they can be pleaded; then whether this second plea is duly, aptly and properly pleaded?

1. As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so (as to him), there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one intire agreement; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light; this is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice; many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury, seems to be a greater offence than compounding some felonies; the promisory note was certainly void; what right then hath the plaintiff to recover upon this bond which was given to indemnify him from a note that was void? they are both bad, the consideration for giving them being wicked and unlawful.

2. As to the second point, we are all of opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever; and it is so held by all writers whatsoever.

PART II.

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upon this subject, except in one passage in *Grotius*, lib. 2. cap. 11. sect. 9. where I think he is greatly mistaken, and differs from *Puffendorf*, lib. 3. cap. 8. sect. 8. who, in my opinion, convicts the doctrine of *Grotius*. In *Justin. Instit.* lib. 3. tit. 20. de turpi causa, sect. 23. *Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.* And *Vinnius*, in his commentary, carries it so far as to say you shall not stipulate or promise to pay money to a man not to do a crime, *Si quis pecuniam promiserit, ne furtum aut cædem faceret, aut sub conditione, si non fecerit, ad hoc dicendum, stipulationem nullius esse momenti; cum hoc ipsum flagitiosum est, pecuniam pacisci quo flagitio abstineas.* Dig. lib. 1. tit. 5. Code lib. 4. tit. 7. to the same point.

This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law, and the reason why the common law says such contracts are void, is for the public good: *You shall not stipulate for iniquity*; all writers upon our law agree in this, no polluted hand shall touch the pure fountains of Justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again, you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back, *Procul O! procul este profani.* See Doct. & Stud. fo. 12, and Chap. 24.

3. The third point is, whether this matter can be pleaded; it is objected against the defendant that he has no remedy at law, but must go seek it in a court of equity; I answer, we are upon a mere point of common law, which must have been a question of law, long before the courts of equity exercised that jurisdiction, which we now see them exercise; a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been antiently as liberal, as they have been in later times; to send the defendant in this case into a court of equity, is to say there never was any remedy at law against such a wicked contract as this is; we all know when the equity part of the court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law, *Est boni judicis ampliare jurisdictionem*; and I say, *est boni judicis ampliare justitiam*; therefore whenever such cases as this come before a court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the Judges of the common law courts, and that courts of equity have risen by the Judges not properly applying the principles of the common law, but being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law. It is now ob-

jected as a *maxim*, that the law will not endure a fact *in pais debors* a specialty to be averred against it, and that a *deed* cannot be defeated by any thing less than a *deed*, and a *record* by a *record*, and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money, but *that* payment to be made, was grounded upon a vitious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shews that in truth, the bond never had any legal entity, and if it never had any *being* at all, then the rule or maxim that a *deed* must be defeated by a *deed* of equal strength doth not apply to this case. The law will legitimate the shewing it void *ab initio*, and this can only be done by pleading; nothing is due under such a contract, then the law gives no action, the *debitum* never existed; as much as if it had been said it shall be void because there is no debt: but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to me most unreasonable and unrighteous, and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place; what strange absurdity would it be for the law to say that this contract is wicked and void and in the same breath for the law to say, you shall not be permitted to plead the facts which clearly shew it to be wicked and void: I am not for stirring a single pebble of the common law, and without altering the least tittle thereof, I think it is competent; and reaches the case before us. For my own part I think all the cases upon acts of parliament, with respect to making bonds, &c. void, do warrant the receiving this plea and averment, there is no direction in such acts of parliament given for the form and manner of pleading in those cases, the *end* directs and sanctifies the *means*; I think there is no difference between things made void by act of parliament and things void by the common law; statute law and common law both originally flowed from the same fountain, the *legislature*, I am not for giving any preference to either, but if to either, I should be for giving it to the common law; if there had ever been any idea or imagination, that such a contract as this could have stood good at common law, surely the legislature would have altered it. There has been a distinction mentioned between a bond being void by statute, and at common law, and it is said that in the first case, if it be bad, or void in any part, it is void *in toto*; but that at common law it may be void in part, and good in part, but this proves nothing in the present case; the judges formerly thought an act of parliament might be eluded if they did not make the whole void, if part was void; it is said the statute is like a tyrant, where he comes he makes *all* void, but the common law is like a nursing father, makes only void that *part* where the fault is, and preserves the rest. 1 *Mod.* 35, 36. The case of a simoniacal contract may be reached by a plea, this proves the contract in the present

1 Lev. 209.
Hard. 464.

present case is to be avoided at common law; the two cases in *Leon*. I set one against the other, and lay no stress upon either; *infancy, coverture, duress, &c.* apply directly to this case, the plea shews a fact, which if true the bond never had any legal existence at all; as to a bond being a gift, that is to be repelled by shewing it was given upon a bad consideration; you may thereby repel the presumption of donation; it has been objected that the admission of such plea as the present, will strike at securities by deed; the answer is, that such a plea in the case of *infancy, gaming, duress, &c.* is admissible; what is the plea of *non est factum*? 99 in 100 of them are false, why then is such a plea to be received; and not the present plea, I see no reason why. I want no case to warrant my opinion, it is enough for me, if there be no case against me, and I think there is not. In 1 *Hen.* 7. 14. 16. *b.* *Brian* was then the Chief Justice, and his opinion there is founded upon what I have now said; *Brian* says; "I do not see in any case in the world how
 " a man can avoid a specialty by a bare matter of fact concerning
 " the same deed, *if so be that the deed was good at the commence-*
 " *ment*; but the present deed was never good. *Moor.* 564. is a simoniacal contract pleaded to a bond, which was held a bad plea, because *simony* was not *then* considered as contrary to our law, but at this day, *simony* being against our law, such a plea would be good; the case in *Comb.* 121. is nothing but an *obiter dictum* of a judge to which I pay very little regard.

Cro. Eliz.
 697 623.
 Jenk. 108.
 Moor 564.

4. As to the fourth point, I think, the plea is rightly pleaded, and concludes very properly in saying, "And so the said bond is void"; it seems to me that *non est factum* could not have been properly said at the conclusion of this plea after the special matter before alledged; *non est factum* means nothing but that, "I did not seal and deliver the bond"; and why *non est factum* may be pleaded by a *feme covert* I do not clearly see the reason, unless the law unites the husband and wife so closely that it considers them as one and the same person, so that she, without the husband cannot execute the deed. If two be jointly bound, and only one sued, he cannot plead *non est factum*, but ought to plead that another was bound with him. 5 *Rep.* 119. *a. b.* it is fair to tell the party what is your defence, upon what point you put your case; I think the right way is to conclude the plea as it is, *And so the said writing obligatory is void, et hoc, &c.* and so pray judgment if the plaintiff ought to have his action, &c. and do not see how he could say *non est factum*, when he sealed the deed: But supposing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer, as this is, and we are all of opinion that judgment must be for the defendant; that the averment pleaded is not contradictory, but explanatory of the condition, that the bond was void *ab initio*, and never had any existence. Judgment for the defendant *per totum curiam.*

Trinity

Trinity Term

7 Geo. 3. 1767.

Chamberlyn *versus* Delarive. C. B.

6 Q3 249

13 May 62

ACTION upon the case for work and labour done by the plaintiff for the defendant, upon the general issue, tried before Ld. Ch. Just. *Wilmot*. At the trial it appeared in evidence that the defendant being indebted to the plaintiff in 18*l*. for work done, the defendant gave the plaintiff a note or draught upon one *Heddy*, whereby the defendant desired *Heddy* to pay to the plaintiff a few days after date 18*l*. for value received; the plaintiff took and held this note or draught four months, and never applied to *Heddy*, to demand the money of him; *Heddy* afterwards broke and became insolvent; the note or draught not being payable to the plaintiff *Chamberlyn, or order*, the jury looked upon it as not a negotiable bill of exchange or draught, and found a verdict for the plaintiff, damages 18*l*. contrary to the directions and opinion of the Lord Chief Justice; and therefore it was now moved for a new trial without payment of costs.

A creditor accepts a note or draught of his debtor upon a third person, to be paid a sum of money for value received, if he holds it an unreasonable time before he demands the money, and the person upon whom it is drawn becomes insolvent, it is the creditor's own loss, though this draught be not a bill of exchange or negotiable.

Curia: 1st, It was objected for the plaintiff, that this is not a bill of exchange, because it is not negotiable, that it is of the very essence of a bill of exchange to be payable to such a one *or order*, and therefore the plaintiff shall not lose the value thereof, as he would have done if it had been negotiable, by reason of his holding it so long without demanding the money of *Heddy*; 2^{dly}, That the plaintiff was no more than a servant or agent to the defendant in this case, and could not receive the money for his own use; as to the 1st objection, we think it is not necessary in this case to give any opinion, whether this be a bill of exchange or not, because we are of opinion that when the plaintiff accepted and took from the defendant this note, draught or order upon *Heddy* for 18*l*. to be paid to the plaintiff for value received, the plaintiff acquired an interest in the 18*l*. and if he had received it of *Heddy*, he would have received the same for his own use, and not for the use of the defendant the drawer; the plaintiff by accepting this note or draught, un-

If the Drawer is proved that he never had any appt of the Debt in his hands he can't have received Appl. vide note on B. N. P. 277.

PART II.

4 X

dertook

dertook to be duly diligent in trying to get the money of *Heddy* and to apprise the defendant the drawer if *Heddy* failed in payment; the plaintiff substituted himself in the place of the defendant the drawer, who has been deluded into a belief, that the plaintiff had got the money of *Heddy*. The common law detests *negligence* and *laches*; there is no reason applicable to the case of holding a bill of exchange that is not applicable to this case; the plaintiff by holding this order four months hath discharged the defendant of his debt, and credited *Heddy* in his stead and place; if this verdict should stand it would be mischievous: if a jury can say that a man may hold such an order or draught as this is ten weeks after it is due, they may as well say he may hold it ten years; here appears to be gross negligence in the plaintiff, and we think the jury shall not pronounce the law in such a case as this is, and therefore there must be a new trial upon payment of costs.

Michaelmas Term

8 Geo. 3. 1767.

3. *Wils.* 295.

Walton *versus* Kerfop and another. C. B.

Replevin, and declares for taking his cattle at M. Defendant pleads non cepit modo & forma; plaintiff proved the cattle were in the defendant's custody at M. defendant proved they were originally taken at H. Judgment for the plaintiff.

REPLEVIN; the plaintiff declares for taking his cattle in *Market-street* ward; the defendant pleads the general issue *non cepit modo & forma*; this cause was tried before Mr. Justice Gould at the last assizes for *Northumberland*; when the plaintiff proved that the cattle were in the custody and possession of the defendant at *Market-street*, where he was driving them to the pound; the defendant proved that he first and originally took them at *Haraball* in the parish of *Warden*, and was driving them through *Market-street* unto the pound; it was insisted at the trial that the plaintiff had not proved his declaration, that the cattle were taken at *Market-street*, as it was alledged therein, for that the defendant had proved they were first taken at another place, *viz.* at *Harball* in the parish of *Warden*; there was a verdict for the plaintiff subject to the opinion of the court.

Serjeant

Serjeant *Glynn* for the plaintiff insisted that the plaintiff had well proved the taking at *Market-street*, as laid in the declaration, for he proved the cattle were *there* in the defendant's custody, and although it may be true that the defendant originally took them at *Hardball*, yet as he the plaintiff was unable to prove the taking there, it would be very unreasonable and inconvenient if he was obliged to lay the taking *there*. That the defendant ought to have pleaded in abatement, and alledged that they were taken at *Hardball*, *absque hoc* that they were taken at *Market-street*, upon which the plaintiff might have taken issue, or confessed the plea, and justified the taking at *Hardball*, and driving them to *Market-street* towards the pound; and he insisted that wherever the defendant has the cattle wrongfully in his custody *that* is a wrongful taking at that particular place; as in the case of larceny committed in one county, and the felon flies with the goods into another county, it is a felony in both counties, and he may be tried in either county.

Serjeant *Burland* for the defendant insisted that upon the plea of *non cepit modo et forma*, the defendant may prove the taking was at a different place from *that* laid in the declaration; and for that purpose cited *Johnson v. Wollyer*, 1 *Stra.* 508. 2 *Mod.* 199. *Anonymous*. by Lord *North* C. J. if the plaintiff alledges the taking at *A.* and they were taken at *B.* the defendant may plead *non cepit modo & forma*, but then he can have no return, for if he would have a *return' habendo*, he must deny the taking where the plaintiff hath laid it, and alledge another place in his avowry. He also said that in replevin the first place of taking is the only material place, and must be laid in the declaration, and it is not like the case of *larceny* above mentioned.

Wilmot Ch. Justice: At this day it is very clear that the vill and place where the cattle are taken must be laid in the declaration, if there is no place defendant may demur, but here is a place laid; and it was proved the cattle were in defendant's possession *there*; and though originally defendant took them at another place, yet if he took them wrongfully at first, the wrong is continued to any place where the defendant has them. 1 *Stran.* 508. is only a case at *Nisi prius*, and 2 *Mod.* 199. a *dictum* of Lord *North*; and neither of those cases are like this, for here is a sufficient proof (in my opinion) of the plaintiff's declaration, to wit, that the cattle were taken at *Market-street*; this case is very clear, and like the case mentioned of *larceny*, the wrong continues wherever the defendant has the cattle; and I am quite satisfied the defendant's evidence was irrelevant and immaterial on this issue, and ought not to have been admitted unless the defendant had pleaded in abatement. And of this opinion was the whole court, and the *Postea* was ordered to be delivered to the plaintiff. See *Cro. Eliz.* 896. *Hob.* 16. *Moor* 678.

678. See the case of *Riley v. Parkhurst* ante, *Trin.* 21 & 22 Geo. 2. cited by *Bathurst* Justice.

Roe on the demise of Hamerton *versus* Mitton and others. C. B.

6m & 60

What act of a parent shall be a good consideration to support a limitation in a marriage settlement by way of remainder to the younger brothers of the intended husband, eldest son of that parent.

THIS was an ejectment for lands in *Yorkshire*; the jury found a special verdict, which stated very long deeds and conveyance, *finis sur concessit, sur consueance de droit come ceo, &c. &c. &c.* containing several hundreds of copy sheets, which was argued twice at the bar, and in this term the judgment of the court was given by the Ch. Justice.

Lord Ch. Justice *Wilmot*: The question in this case is a very short one, but it is so involved and covered by the length of this special verdict, that it is more difficult to find it out than to determine it; this shameful prolixity puts the parties to an unnecessary and immoderate expence, and therefore it was, that *cases reserved* were first introduced instead of special verdicts; but surely special verdicts may be drawn out and stated as shortly as cases for the opinion of the court; I therefore recommend it to gentlemen who have the drawing of special verdicts, to state them as shortly as possible, and if they should have any doubt whether they are fully and sufficiently stated and the facts found be properly inserted, the judge who tried the cause will always be ready to lend his assistance, in order to prevent this most shameful prolixity, which is a scandal to the profession, and to the law itself; I have often thought of, and been grieved at this matter, and therefore was determined to mention it publicly, to prevent it for the future, if it possibly can be done; and I can see no reason why it may not, as the judges themselves, I am sure, will all be willing to assist counsel in so good a work.

The case is singly this: *John Hamerton* in 1706. being seised in fee of the lands in question, and at the same time having a mother living, who had an annuity of 50*l.* issuing out of the whole lands, and *John* having two brothers *Thomas* and *Vavasor*, *John* being about to be married to *Mary Kelly*; his mother previous to the marriage consents to part with her security upon the *whole* lands for her annuity, and to take, instead thereof, a security for the same upon *part* of the lands; and accordingly she and her said son *John* (the intended husband) join in a fine to deliver the whole lands from the said annuity; and in consideration of the marriage and a portion of 1300*l.* and of the said grant and release of the said annuity, *John Hamerton* conveys to trustees that they should pay 50*l.* per ann. to the mother, out of part of the lands for her life, then as to the whole of the lands to the use of *John Hamerton* for life, remainder

to trustees to preserve contingent remainders, remainder to the first and every other son in tail male, remainders to *Thomas Hamerton* and *Vavasor Hamerton* severally one after the other in tail male in strict settlement, remainder to the daughter and daughters of the marriage of *John Hamerton* and *Mary Kelly*, remainder to *John Hamerton* in fee.

There was no issue of the marriage; afterwards *John Hamerton* mortgaged the estate to *Monkton*, and acknowledged a fine to him *sur concessit*, then *Monkton* purchased of *John Hamerton* for a valuable consideration in fee, and took a fine from him *sur conveyance de droit come ceo*, &c. and *John Hamerton* died without issue, but *Thomas Hamerton* his brother has left a son *Vavasor Hamerton* the lessor of the plaintiff a very poor man, (who it is said was, or is a common soldier.)

The single question is, whether there is a good and valuable consideration to support the limitation in the settlement to *Thomas Hamerton*, the late father of the lessor of the plaintiff, or whether that limitation is merely voluntary under the stat. of 27 *Eliz. cap. 6.* and bad against a purchaser for a valuable consideration.

I am very clearly of opinion that this settlement is fair and honourable, and that there is a good and valuable consideration to support the limitation therein to *Thomas Hamerton*, the late father of the lessor of the plaintiff, and that it is quite out of the stat. 27 *Eliz. c. 6.* which was only made against covinous and fraudulent conveyances, and which makes the parties avowing such fraudulent conveyances criminal; whether the purchaser for a valuable consideration had notice of this settlement or not, is not material (I think) in this case; but if he had notice, I am clearly of opinion that the purchase is fraudulent.

The whole of this question turns upon the mother's joining in the settlement; the friends and relations of *Mary Kelly* the intended wife of the marriage (must be supposed to say) to the mother of *John* the intended husband, "*Mary shall not marry your son unless you will give up, or take off your annuity from the whole of the lands, and let it be charged upon a part thereof; the mother answers, if you want my assistance you shall pay for it, that is to say, you shall limit the estate to my younger sons in preference and priority to the daughters of the marriage in failure of issue male*"; this is a good consideration to *John* the son, (and the quantum is not at all material) he purchases his wife by his mother's concurrence.

But it was objected that *John* was seised, and could have made the settlement without the mother, and that in truth no real or good consideration moved from her at all, for that she still had her annuity charged upon *part* of the lands; in answer to this, the applying to the mother, shews that *John Hamerton* could not have made a settlement agreeable to the lady's friends without the mother; and I am of opinion that any consideration given by the mother would have made her a purchaser for her younger sons; by the limitation to the daughters of the marriage after *that* to the two brothers of *John Hamerton*, it is plain the mother intended her sons should be preferred to the daughters of the marriage; and this is as plain to me as if I had heard the mother say, "I will not part with my annuity secured upon the *whole* lands, and take a security for it upon *part* of the lands, unless you will prefer my sons to your daughters"; the settlement can have no other meaning, and any consideration moving from a parent to a child is good. The whole court were of the same opinion, and judgment was given for the plaintiff.

Bibbins & al' *versus* Mantel a prisoner in the Fleet. C.B.

infra 370 - 374

After the interlocutory judgment and awarding the writ of inquiry the plaintiff becomes a bankrupt, and afterwards in his own name the inquiry is executed, and good, without suing out a scire facias at the suit of the assignees.

ACTION upon the case upon several promises; the plaintiff declared in *Easter* term last, and in *Trinity* term last obtained an interlocutory judgment, whereupon a writ of inquiry was *then* awarded, returnable and executed in this present term, but after the said judgment, and the awarding the writ of inquiry and before the same was executed, the plaintiff became bankrupt; whereupon it was now moved on the behalf of the defendant, that the writ of inquiry and inquisition taken thereon might be set aside, for that by the stat. of *Jac.* 1. of bankrupts, the debt owing to the plaintiff is immediately vested in the assignees upon his becoming a bankrupt, and therefore they ought to have sued out a *scire facias* against the defendant, to shew cause why they should not have had a writ of inquiry of damages; upon shewing cause, it was said for the plaintiff, that the defendant is a prisoner, and will be discharged by *superfedeas* if the plaintiff cannot be permitted to proceed to final judgment this term upon the writ of inquiry,

Curia: We will consider this as a writ of inquiry executed by the assignees in the name of the bankrupt, and the objection coming out of the mouth of the defendant is very unfavourable; besides, the writ was awarded in last term before the plaintiff was a bankrupt, and the inquisition ought, in justice, to be supported, otherwise the defendant would get out of gaol, and the creditors thereby might be greatly injured, so the rule must be discharged. *Nota*, there is no case in point to be found in the books; but the statute 21 *Jac.* 1. c. 19.

3. Term
Rep. Blue
437.

Waugh v. Astle
10 A.L.E. 623

c. 19. enacts, that the laws against bankrupts shall be in all things largely and beneficially construed for the relief of the creditors.

Slater versus Baker and Stapleton. C. B.

SPECIAL action upon the case, wherein the plaintiff declares that the defendant *Baker* being a surgeon, and *Stapleton* an apothecary, he employed them to cure his leg which had been broken and set, and the callous of the fracture formed; that in consideration of being paid for their skill and labour, &c. they undertook and promised, &c. but the defendants not regarding their promise and undertaking, and the duty of their business and employment, so ignorantly and unskilfully treated the plaintiff; that they ignorantly and unskilfully broke and disunited the callous of the plaintiff's leg after it was set, and the callous formed, whereby he is damaged. The defendants pleaded not guilty, whereupon issue was joined, which was tried before the Lord Chief Justice *Wilmot*, and a verdict found for the plaintiff, damages 500. The substance of the evidence for the plaintiff at the trial was, first a surgeon was called, who swore that the plaintiff ~~having broken~~ both the bones of one of his legs, this witness set the same, that the plaintiff was under his hands nine weeks, that in a month's time after the leg was set, he found the leg was healing and in a good way; the callous was formed, there was a little protuberance, but not more than usual; upon cross examination he said he was instructed in surgery by his father, that the callous was the uniting the bones, and that it was very dangerous to break or disunite the callous after it was formed.

Special action on the case against a surgeon and an apothecary for unskilfully disuniting the callous of the plaintiff's leg after it was set.

John Latham an apothecary swore he attended the plaintiff nine weeks, who was then well enough to go home, that the bones were well united, that he was present with the plaintiff and defendants, and at first the defendants said the plaintiff had fallen into good hands; the second time he saw them all together the defendants said the same, but when he saw them together a third time there was some alteration, he said the plaintiff was then in a passion, and was unwilling to let the defendants do any thing to his leg; he said he had known such a thing done as disuniting the callous, but that had been only when a leg was set very crooked; but not where it was streight.

A woman called as a witness, swore that when the plaintiff came home he could walk with crutches, that the defendant *Baker* put on to the plaintiff's leg an heavy steel that had teeth, and would stretch or lengthen the leg, that the defendants broke the leg again, and three or four months afterwards the plaintiff was still very ill and bad of it.

The

The daughter of the plaintiff swore, that the defendant *Stapleton* was first sent for to take off the bandage from the plaintiff's leg, when he came he declined to do it himself, and desired the other defendant *Baker* might be called in to assist; when *Baker* came he sent for the machine that was mentioned; plaintiff offered to give *Baker* a guinea, but *Stapleton* advised him not to take it then, but said they might be paid altogether when the business was done; that the third time the defendants came to the plaintiff, *Baker* took up the plaintiff's foot in both his hands and nodded to *Stapleton*, and then *Stapleton* took the plaintiff's leg upon his knee, and the leg gave a crack when the plaintiff cried out to them and said, "you have broke what nature had formed"; *Baker* then said to the plaintiff *You must go through the operation of extension*, and *Stapleton* said we have consulted and done for the best.

Another surgeon was called and swore, that in cases of crooked legs after they have been set, the way of making them straight is by compression and not by extension, and said he had not the least idea of the instrument spoken of for extension; he gave *Baker* a good character, as having been the first surgeon of St. *Bartholomew's* hospital for 20 years, and said he had never known a case where the callous had deossified.

Another surgeon was called who swore, that when the callous is formed to any degree, it is difficult to break it, and the callous in this case must have been formed, or it would not have given a crack, and said extension was improper, and if the patient himself had asked him to do it, he would have declined it, and if the callous had not been hard he would not have done it without the consent of the plaintiff, that compression was the proper way, and the instrument improper; he said the defendant *Baker* was eminent in his profession. Another surgeon was called who swore, that if the plaintiff was capable of bearing his foot upon the ground, he would not have disunited the callous if he had been desired by him, but in no case whatever without consent of the patient; if the callous was loose it was proper to make the extension to bring the leg into a right line. A servant of the plaintiff swore the plaintiff had put his foot upon the ground three or four weeks before this was done.

The counsel for the defendants at the trial, for *Baker* relied upon the good character which was given him, and objected there was no evidence to affect the other defendant *Stapleton* the apothecary; but the Lord Chief Justice thought there was such evidence against both the defendants as ought to be left to the jury, as the nodding, the advising *Baker* not to take the guinea offered to him by the plaintiff, besides the apothecary first proposed sending for *Baker*; the plaintiff was in no pain before they extended his leg, and he only
sent

to *Stapleton* to have the bandage taken off; the Lord Chief Justice asked the jury whether they intended to find the damages against both the defendants, and they found 500*l.* against them jointly, and he said he was well satisfied with the verdict.

It was now moved that the verdict ought to be set aside because the action is upon a joint contract, and there is no evidence of a joint undertaking by both the defendants; the plaintiff sends for *Stapleton* to take off the bandage who declines doing it, and says, I do not understand this matter, you must send for a surgeon; accordingly Mr. *Baker* is sent for, who enters upon the business as a surgeon unconnected with *Stapleton*, who, it does not appear, ever undertook for any skill about the leg, so the jury have found him guilty without any evidence. That *Baker* has been above 20 years the first surgeon in St. *Bartholomew's* hospital, reads lectures in surgery and anatomy, and is celebrated for his knowledge in his profession as well as his humanity; and to charge such a man with ignorance and unskilfulness upon the records of this court is most dreadful; all the witnesses agreed Mr. *Baker* doth not want knowledge, therefore this verdict ought not to stand. 2dly, It was objected that the evidence given does not apply to this action, which is upon a joint contract; the evidence is that the callous of the leg was broke without the plaintiff's consent; but there is no evidence of ignorance or want of skill, and therefore the action ought to have been trespass *vi & armis* for breaking the plaintiff's leg without his consent; all the surgeons said they never do any thing of this kind without consent, and if the plaintiff should not be content with the present damages, but bring another action of trespass *vi & armis*, could this verdict be pleaded in bar? the court without hearing the counsel for the plaintiff gave judgment for him.

Curia: 1st, It is objected that this is laid to be a joint undertaking, and therefore it ought to be proved, and we are of opinion that it ought; the question therefore is, whether there is any evidence of a joint undertaking; we are of opinion there is; Mr. *Stapleton* declines acting alone, but in concurrence with Mr. *Baker* attends the plaintiff every time any thing is done, and assists jointly with Mr. *Baker*; this appears in evidence, and is sufficient, for there is no occasion to prove an express joint contract, promise or undertaking; when an offer is made to *Baker* of a guinea, *Stapleton* says, you had better be paid all at last; they both attended plaintiff together every time, and *Stapleton* said, we have consulted and done for the best; when the plaintiff complained of what they had done, *Stapleton* considered himself as one of the persons to join in the cure of the leg, for he put his hand on the knee when *Baker* nodded, and then the bone cracked; he is the original person aiding in this matter, and there is no ground for this objection. When we con-

sider the good character of *Baker*, we cannot well conceive why he acted in the manner he did; but many men very skilful in their profession have frequently acted out of the common way for the sake of trying experiments; several of the witnesses proved that the callous was formed, and that it was proper to remove plaintiff home; that he was free from pain and able to walk with crutches; we cannot conceive what the nature of the instrument made use of is; why did *Baker* put it on when he said that plaintiff had fallen into good hands, and when plaintiff only sent for him to take off the bandage, it seems as if Mr. *Baker* wanted to try an experiment with this new instrument.

2dly, It is objected that this is not the proper action, and that it ought to have been trespass *vi & armis*; in answer to this, it appears from the evidence of the surgeons that it was improper to disunite the callous without consent, this is the usage and law of surgeons; then it was ignorance and unskilfulness in that very particular, to do contrary to the rule of the profession, what no surgeon ought to have done; and indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation; it was objected this verdict and recovery cannot be pleaded in bar to an action of trespass *vi & armis* to be brought for the same damage; but we are clear of opinion it may be pleaded in bar. That the plaintiff ought to receive a satisfaction for the injury, seems to be admitted; but then it is said the defendants ought to have been charged as trespassers *vi & armis*; the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if it be possible. For any thing that appears to the court this was the first experiment made with this new instrument, and if it was, it was a rash action, and he who acts rashly acts ignorantly; and although the defendants in general may be as skilful in their respective professions as any two gentlemen in *England*, yet the court cannot help saying that in this particular case they have acted ignorantly and unskilfully, contrary to the known rule and usage of surgeons.

Judgment for the plaintiff *per totam curiam*.

Drinkwater

Drinkwater *versus* The corporation of the London Assurance. C. B.

THIS is an action of covenant against the defendants upon a policy of insurance of a malting-office of the plaintiff at *Norwich* from fire, in which policy there is a proviso that the corporation shall not be liable in case the same shall be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever; and the plaintiff in the declaration avers that on the 28th of September 1766. the said malting-office was burnt not by any invasion, by foreign enemies, or any military or usurped power whatsoever, and that defendants have not kept their covenant, to the plaintiff's damage. The defendants plead first the general issue, that they have not broke their covenant, and thereupon issue is joined. Secondly, The defendants plead that it was burnt by an *usurped power*; the plaintiff replies that it was not burnt by an *usurped power*, and thereupon issue is also joined. This cause was tried at *Norwich* affizes, verdict for the plaintiff and 469*l.* damages, subject to the opinion of the court, upon the following case, *viz.* That upon *Saturday* the 27th of *September* last a mob arose at *Norwich* upon account of the high price of provisions, and spoiled and destroyed divers quantities of flour; thereupon the proclamation was read, and the mob dispersed for that time; afterwards another mob arose, and burnt down the malting-office in the policy mentioned; the question is whether the plaintiff is intitled to recover in this action.

Covenant upon a policy of insurance from fire, proviso that defendants shall not be liable in case the house be burnt by reason of any invasion, foreign enemies, or any military or usurped power. The house was burnt by a mob at *Norwich*, this is not within the proviso.

This case was twice argued at the bar, and after time taken to consider, Mr. Justice *Gould* was of opinion that the malting-office being burnt by the mob who rose to reduce the price of provisions, the same was burnt by an *usurped power* within the true intent and meaning of the proviso in the policy; that it is an usurped power for any persons to assemble themselves, to alter the laws, to set a price upon victuals, &c. he cited *Popb.* 122. where it is agreed by the justices that to attempt such a thing by force is felony, if not treason; and therefore he was of opinion that judgment ought to be for the defendants.

Mr. Justice *Batburst*, was of opinion that the words "*usurped power*," in the proviso according to the true import thereof and the meaning of the parties, can only mean an invasion of the kingdom by foreign enemies to give laws and usurp the government thereof, or an internal armed force in rebellion assuming the power of government by making laws, and punishing for not obeying those laws; he said, the plea alledges the malting-office was burnt by an *usurped power* unlawfully exercised, but does not charge *that* usurped power

power as a *rebellion*; that a mob rose at *Norwich* on account of the price of victuals, and as soon as the proclamation was read they dispersed; so he was of opinion that judgment ought to be given for the plaintiff.

Clive Justice, Was of opinion that the words *usurped power* in the proviso, must mean such an *usurped power* as amounts to high treason which is settled by the 25 *Ed.* 3. That the offence of the mob in the present case was a felonious riot for which the individuals might have suffered, but cannot be said to be an *usurped power*; therefore he was of opinion that judgment should be given for the plaintiff.

Wilmot Chief Justice: Upon the best consideration I am able to give this case, I am of opinion that the burning of the malting-office, was not aburning by an *usurped power* within the meaning of the proviso; policies of insurance like all other contracts must be construed according to the true intention of the parties, although the counsel on one side said that policies ought to be construed liberally; on the other side that they ought to be construed strictly; in a doubtful case I think the turn of the scale ought to be given against the speaker, because he hath not fully and clearly explained himself; the imperfection and poverty of language to express our ideas, is the occasion that words have equivocal meanings, and it is often very uncertain what the parties to a contract in writing mean; when the ideas are simple, words express them clearly; but when they are complex, difficulties often arise, and men differ much what ideas are occasioned by words. In the present case what is the true *idea* conveyed to the mind by the words "*usurped power*"? the rule to find it out is to consider the words of the context, and to attend to the popular use of the words, according to *Horace*, *Arbitrium est, et jus, & norma loquendi*; my *idea* of the words *burnt by usurped power*, from the context, is, that they mean burnt, or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it; when the laws are dormant and silent, and firing of towns is unavoidable; these are the outlines of the picture drawn by the *idea* which these words convey to my mind: the time of the incorporation of this society of the *London assurance company* was soon after a rebellion in this kingdom, and it was not so romantic a thing to guard against fire by rebellion as it might be now, the time therefore is an argument with me that this is the meaning of these words; rebellious mobs may be also meant to be guarded against by the proviso, because this corporation commenced soon after the riot act; and if common mobs had been in their minds they would have made use of the word *mob*; the words "*usurped power*" may have great variety of meanings according to the subject matter where they are used, and it would be pedantic

dantic to define the words in all their various meanings, but in the present case they cannot mean the power used by a common mob; it has not been said that if one or fifty persons had wickedly set this house on fire, that it would be within the meaning of the words *usurped power*. It hath been objected that here was an *usurped power* to reduce the price of victuals, and that this is part of the power of the crown, and therefore it was an *usurped power*, but the King has no power to reduce the price of victuals; the difference between a rebellious mob and a common mob is, that the first is high treason, the latter a riot or a felony; whether was this a common mob or a rebellious mob? the first time the mob rises the magistrates read the proclamation, and the mob disperse, they hear the law and immediately obey it; the next day another mob rises upon the same account, and damages the houses of two bakers; thirty people in 15 minutes put this army to flight, and they were dispersed and heard of no more; where are the *species belli* which Ld. Hale describes? this mob wants a universality of purpose to destroy, to make it a rebellious mob, or high treason. *Hale's Pl. Coron.* 135. There must be a universality, a purpose to destroy *all* houses, *all* inclosures, *all* bawdy-houses, &c. here they fell upon two bakers and a miller, and the mob chastised the particular persons to abate the price of provisions in a particular place; this does not amount to a rebellious mob. When the laws are executed with spirit, mobs are easily quelled; sometimes a courageous act done by a single person, will quell and disperse a mob, and sometimes the wisdom of an individual will do the same, as is thus beautifully described by Virgil,

*Ac veluti magno in populo cum saepe coorta est
Seditio, Sævitque animis ignobile vulgus,
Tamque faces & saxa volant: furor arma ministrat.
Tum pietate gravem, ac meritis, si fortè virum quem
Conspexere, silent, arrectisque auribus adstant:
Ille regit dictis, animos, & pectora mulcet.*

But amongst armies, great guns and bombs, the laws are silenced, and the wisdom, or courage of an individual will signify nothing. Upon the whole, I am of opinion there must be judgment for the plaintiff; and accordingly the *postea* was ordered to be delivered to him, by three Judges against one.

Sparrow *versus* Turner. C. B.

Costs, for the future are to be allowed when a cause goes off and remains to be tried pro defectu juratorum.

1 Stra. 300.
Price v.
Birch Trin.
16 Geo. 2.
B. R. Standen v. Hall,
Easter 29
Geo. 2. B. R.

THIS cause being at issue, the plaintiff moved for a special jury, when the cause came on to be tried, all the jury did not appear, and neither side prayed a *tales*, so the cause went off, for that time, for want of jurors; at another day it came on to be tried, when a verdict was found for the defendant; but the prothonotary did not allow to the defendant his costs occasioned by the attendance of his attorney, counsel and witnesses, when the cause went off for want of jurors; and therefore it was now moved on behalf of the defendant, that the prothonotary might review his taxation, and be directed to allow the defendant his costs occasioned by the cause going off as above, that this was the practice of the court of King's Bench, and very reasonable. For the plaintiff it was said that in this court the practice was otherwise, and that costs in such case had never been allowed here, which was agreed to be so by all the officers of the court present.

The practice of this court altered as to costs, when a cause remains for want of jurors.

Curia: As it is the practice *here* not to allow costs in this case, the prothonotary has done right, and therefore we will not order him to review his taxation in this particular case; but for the future it may be reasonable to make the practice of this court conformable to that of the King's Bench, and therefore for the future we order that the practice be altered accordingly. The default was equal, for either the plaintiff or defendant might have prayed a *tales*, they both acted upon a presumption that the practice was not to allow any costs on either side, and that seems to be the reason why neither of them prayed a *tales*.

Tillard *versus* Shebbecare. C. B.

Evidence.
A copy of the bishop's institution book is not evidence of a presentation by the patron to a living.
1 Vent 14.
Clarke v. Heath
1 Sid. 426.
S. C.

QUARE impedit, verdict for the plaintiff; upon a motion for a new trial, the question was, whether the copy of an entry of an *institution*, in the Bishop's institution book, be evidence admissible and sufficient to prove a *presentation* by the patron to the living. It was objected for the defendant, that the presentation under the hand and seal of the patron ought to have been produced, or upon evidence that a proper search had been made for the *presentation* itself, and that it could not be found; then the Bishop's institution-book itself (which is the next best evidence) ought to have been produced, but neither of these things hath been done. For the plaintiff it was said that the court will not grant a new trial in *quare impedit*, because the plaintiff can recover no costs, nor more damages than half a year's value of the benefice; whereupon the counsel for the defendant

defendant proposed to pay the plaintiff costs, and to account for the profits of the living in case there should be another verdict against the defendant.

Curia: There must be a new trial; the true point is, might not the plaintiff have produced better evidence? he has neither produced the *presentation*, nor shewn that he hath made a proper search for it, and that it could not be found; besides, the Bishop's institution-book might have been produced, which would have been better evidence than a copy from it. Let there be a new trial, the defendant undertaking to pay plaintiff his costs, and to account to him for the profits of the living, if another verdict be found against the defendant.

Hilary Term

8 Geo. 3. 1768.

Eichorn *versus* Le'maitre. C. B.

ACTION upon the case upon several promises for goods sold and delivered; the defendant pleaded *misnomer* in his christian name in *abatement*; the plaintiff replied, that the defendant was called and known as well by the name of *A. L.* as by the name of *B. L.* and thereupon issue was joined; upon the trial the jury found a verdict for the plaintiff, but did not assess any damages. And now it was moved on the behalf of the plaintiff, that a writ of inquiry might issue to assess the damages; for that the defendant's plea being found to be false, the judgment to be given against him in this case must be peremptory and final; and there is no difference whether the plea pleaded be in bar or *abatement*; and for this purpose was cited *Bro. tit. Peremptorie, Long eto Ed. 4. 90. b.* where it is agreed for clear law, "That if a dilatory plea be pleaded to the writ, or to the count, or to the action vel hujusmodi, and they join issue, there always, if the issue

3 BKC 502

Issue on a plea in abatement found against the defendant, the judgment shall be peremptory. A writ of inquiry shall not be awarded to supply the omission of the jury at the trial where an attain lies.

Yelv. 112.
1 Vent. 22.

" pass

“ pass against the tenant or defendant in an action real or personal, “ it is peremptory to the tenant or defendant.” And the *Long 5th Ed.* 4. 00. *b.* says, “ it is peremptory, be the issue upon matter dilatory “ or upon matter in bar.” For the defendant it was said, that although in real actions when issue is joined upon a dilatory plea, and tried by a jury, the judgment shall be final according to 1 *Lev.* 163. 1 *Sid.* 252. yet in a personal action, as this is, there shall be a *respondeas ouster*; and therefore a writ of inquiry of damages cannot be awarded. But 2^{dly}, it was said for the defendant, that supposing the judgment to be given upon this issue found against the defendant must be final and peremptory, yet the omission of the jury in not finding damages in this case cannot be supplied by a writ of inquiry of damages, because if the jury upon the writ of inquiry should assess outrageous damages, an attaint would not lie, that being only an inquest of office; whereas an attaint would lie against the jury who tried the issue if they had given outrageous damages in this case; and the rule laid down in *Cheney's case*, 10 *Rep.* 119. is, that the court will never *ex officio* award a writ of inquiry to supply the omission in the finding of the jury upon the trial, in a matter whereupon an attaint may be brought; and therefore if the judgment in this case is to be final and peremptory, the verdict is insufficient for the court to give judgment upon, and a writ of *venire facias de novo* ought to be awarded.

2 *Sira.* 1021,
1 *Vent.* 40.

Skin. 595.
1 *Sid.* 380.
Ld. Roy. 59.
11 *Rep.*
Bentham's
case.
2 *Rol. Abr.*
722. pl. 14,
15, 16, 17,
&c.
Carth. 362.

Curia: The first question is, whether the court upon this issue must pronounce a final and peremptory judgment, and if they must, the second question is whether they can *ex officio* award a writ of inquiry to supply the omission of the jury, or whether a writ of *venire facias de novo* must not go; and we are all of opinion that the judgment must be peremptory, and that there is no difference whether the issue be joined upon a fact in a plea in abatement, or in a plea in bar, for wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false; but upon a demurrer to a plea in abatement there shall be a *respondeas ouster*, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court.

As to the 2d question, We are all of opinion that a writ of inquiry cannot be awarded to supply the omission of the jury in not finding damages, but that a *venire facias de novo* must go; “ for “ where a man may have an attaint, there no damages shall be assessed by the court if they be not found by the jury.” 4 *Leam.* 245. *Godb.* 207. This is an *assumpsit* in which damages are the whole object of the writ and suit, and though issue be joined upon a fact in abatement, yet as to the defendant it is conclusive to all intents and purposes, and involves the damages upon finding the fact

21 *Ed.* 3. 56.
b. 57.
Lrb. Affic. fo.
80 a. b.
Bro. Enquest
pl. 84.

fact against him, and if outrageous damages had been given an attaint would have laid; "In trespass, the defendant pleaded an arbitrement, and it was found against him; the court held that in trespass the whole recovery is damages, which cannot be taxed but by the inquest who passed upon the principal issue." 11 H. 4. 57. b. A *venire facias de novo* was awarded.

Goldfb. 49.
44 Ed. 3. 6b.
2 Roll. Abr.
688.

Ellis qui tam, &c. *versus*——C. B.

ACTION upon the statute for selling coals short in measure, to recover 50*l.* penalty. The defendant last term pleaded a recovery in B. R. for the same offence, and now he moved to withdraw *that* plea, to plead the general issue, and take short notice of trial; but *per curiam* the defendant has delayed the plaintiff by this sham plea, he has produced no affidavit that he has any merits, and deserves to pay the 50*l.* for pleading a sham plea, so the rule must be discharged.

Where a defendant pleads a sham plea, the court will not let him withdraw it and plead the general issue.

Goodtitle, on the demise of Ruffel, clerk, and two others, *versus* Weal, widow, and others. C. B.

IN ejectment, of three fourth parts of certain lands in *Trebandy* and *Marston Court* in the county of *Hereford*, verdict for the plaintiff subject to the opinion of the court upon the following case, which states, that *Thomas Philpot* the elder, great grandfather of the lessors of the plaintiff, being seised in fee of the premises in question, by indenture of the 2d of *February* 1666. made between himself of the one part, and *J. C.* and *W. M.* of the other part, in consideration of a marriage between his son and heir *Thomas Philpot* the younger and *Jane Chin*, covenanted to stand seised to the use of himself *Thomas Philpot* the elder for 14 years for raising portions for the daughters of the marriage, remainder to the use of *Thomas Philpot* the elder for life, remainder to the use of *Thomas Philpot* the younger, and of such child or children of his body upon the body of the said *Jane* to be begotten, in such manner and form, and for such estate and estates in *fee or in tail*, upon such provisos or conditions, and paying such legacies or proportions to the other children of the said *Thomas Philpot* the younger, as he should by his last will and testament in writing, or by any other writing under his hand and seal, in the presence of two or more credible witnesses, nominate, appoint, limit, express and declare; and for want of such nomination, appointment, limitation or declaration, to the use of the heirs of the body of the said *Thomas Philpot* the younger, on the body of the said *Jane* to be begotten; and for want of such child or children or issue,

Power under a marriage settlement to appoint to the children of the marriage, is strictly confined to those children.

PART II.

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to the use of the heirs of the body of the said *Thomas Philpot* the younger, lawfully to be begotten, remainder to the right heirs of the said *Thomas Philpot* the elder, his heirs and assigns for ever.

Thomas Philpot the younger, the grandfather of the lessors of the plaintiff, had issue by *Jane Chin*, *Richard*, *Thomas*, *John* and *Mary*, and by his will of the 2^d of *June* 1688. reciting his power under the said settlement, devised the premises in *Trebandy* and *Marston Court*, and did thereby limit and appoint that the same should remain and come to his son and heir *Richard Philpot* and the heirs of his body begotten for ever; and for want of such issue, to the right heirs of the testator *Thomas Philpot* the younger; *Thomas Philpot* the elder died in 1682. whereupon *Thomas Philpot* the younger entred, and afterwards died seised in 1695, upon whose death *Richard* his son entred, and afterwards died seised in 1708. without issue. *Thomas*, the 2^d son of *Thomas* the grandfather of the lessors of the plaintiff died young without issue; *John* the 3^d son upon the death of his brother *Richard* entred in 1708. and by his will of the 28th of *January* 1744. devised the premises in question to *Hugh Russel* his nephew, who was the eldest son of *Hugh Russel*, who married *Mary* the sister of the testator *John Philpot*, and afterwards the same testator *John Philpot*, died without issue in 1748.

Mary, the sister of *John Philpot*, and daughter of *Thomas Philpot* the grandfather of the lessors of the plaintiff, had issue by *Hugh Russel*, the said *Hugh* the devisee of *John*, and *Richard*, *Thomas* and *William Russel* the lessors of the plaintiff, and a daughter *Mary* now living, and *John Russel*, who died in the life-time of his brother *Hugh*, the eldest brother *Hugh*, on the death of his uncle *John Philpot*, in 1748. entred, and by his will devised the premises in question to his nephew *Thomas Russel*, eldest son of his late brother *John*, whose tenants the defendants are; and afterwards the said testator *Hugh Russel* died 1765. without issue.

The question is, whether the contingent remainder to the use of the heirs of the body of the said *Thomas Philpot* the younger, upon the body of *Jane Chin* his intended wife begotten, created by the deed of settlement of the 2^d of *February* 1766. hath been in any manner destroyed or barred.

Curia: This is a covenant to stand seised to uses, and therefore we can give it the most liberal construction, according to the intent and meaning of the covenantor, which plainly was, that his son should have power to limit the premises to his children of the marriage in fee or tail, as he should think fit; the 1st question therefore is, whether *Thomas Philpot* the younger has in fact made an appointment to any of his children of the marriage in fee; if he has, the whole fee is gone, and the settlement could never take place.

2dly, Suppose his appointment is not an appointment of a fee, then the question is whether an estate-tail appointed is a compleat appointment within the power?

1st, The children of the marriage are the sole objects of the settlement; and we are all of opinion, that *Thomas Philpot* the younger has not appointed the fee to any of his children, for he has devised the premises to his son *Richard* in tail general, with remainder in fee to his own right heirs, and his own right heirs might not have been any of his children of the marriage, so that this is not an appointment within the power, which is wholly confined to the children of the marriage.

2dly, We are of opinion that the appointment of an estate-tail to *Richard* is not sufficient to defeat the settlement, the intent whereof is plain and clear; the old man the covenantor meant that the father should have power over the whole estate, and to dispose of it among his own children as he thought fit, to keep them dutiful to their parents; as if he had said, "if you think fit to dispose of the whole estate, do it in such manner as you please, but you shall dispose of the whole among the children of the marriage; if you do not, the settlement and remainders therein shall take place;" this is the true meaning of the deed of settlement, and we do not confine ourselves to the mere words of it.

We are clear of opinion that the contingent remainder to the heirs of the body of *Thomas Philpot* the younger, upon the body of *Jane* to be begotten, has not in any manner been barred, defeated or destroyed; and the *possession* must be delivered to the plaintiff.

Beal versus Langstaff and his bail. C. B.

THE defendant's bail, and several other persons, made an affidavit that the bail entred into the recognizance at the instance and request of the defendant's attorney, who in consideration thereof promised to the bail to save them harmless, notwithstanding which promise their goods were taken in execution on a judgment upon the bail-bond for 170*l.* and upwards; and now it was moved that the defendant's attorney might be obliged to make the bail satisfaction for the value of their goods taken; but *per curiam* this is only a breach of a parol promise, and we cannot interfere in a summary way, here being nothing criminal, but you must bring your action; so the bail took nothing by the motion; then it was moved that the bail might have the affidavit returned to them; but, *per curiam*, it has been read and is now filed and become a record of the court, and cannot be taken off the file.

Upon a parol promise to save bail harmless, the court will not interfere in a summary way, and when an affidavit has been read and filed, it cannot be taken off the file.

3dly, *Langstaff* and his bail, who were the defendants in the action, made an affidavit that the bail entred into the recognizance at the instance and request of the defendant's attorney, who in consideration thereof promised to the bail to save them harmless, notwithstanding which promise their goods were taken in execution on a judgment upon the bail-bond for 170*l.* and upwards; and now it was moved that the defendant's attorney might be obliged to make the bail satisfaction for the value of their goods taken; but *per curiam* this is only a breach of a parol promise, and we cannot interfere in a summary way, here being nothing criminal, but you must bring your action; so the bail took nothing by the motion; then it was moved that the bail might have the affidavit returned to them; but, *per curiam*, it has been read and is now filed and become a record of the court, and cannot be taken off the file.

In the Common Pleas.

Nota; Easter term in the 8th year of King George the 3d, began upon the 20th day of April 1768. when this court declared that from this day forward all mesne process served upon the return day thereof shall be deemed regular, agreeable to the practice of the court of King's Bench.

Easter Term

8 Geo. 3. 1768.

Hewit and others, assignees of Bibbins and others
bankrupts, *versus* Mantell. C. B.

supra, 370 - *infra*, 370

After the interlocutory judgment the plaintiff becomes a bankrupt, and afterwards proceeds to final judgment. The assignees bring a scire fac. to have execution, and upon demurrer judgment for the assignees.

BIBBINS and others before they became bankrupts brought an action upon the case upon several promises against the defendant Mantell, and obtained an interlocutory judgment by *nil dicit*, against him in Trinity term last, and thereupon a writ of inquiry of damages was awarded, returnable in Michaelmas term last; on the 8th of September last, before the writ of inquiry was executed, the then plaintiffs Bibbins and others became bankrupts, a commission issued, and the now plaintiffs Hewit and others were chosen assignees; and afterwards the bankrupts Bibbins and others proceeded to execute a writ of inquiry of damages, and to final judgment in Michaelmas term last, and thereupon recovered 648*l.* 7*s.* for damages *in toto*; whereupon the assignees, the now plaintiffs, for the benefit of themselves and the rest of the creditors of Bibbins brought a *scire facias* against Mantell, to shew cause why they should not have execution upon the said judgment against him; returnable the first return in last Hilary term; to which Mantell in that term pleaded the whole matter before stated, in bar, and prayed judgment if the assignees ought to have execution against him for the damages on the said judgment; the assignees demurred generally to this plea, and Mantell joined in demurrer.

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4 Bait 345

3. J. R.

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1. It was objected for the defendant that the moment when *Bibbins's* became bankrupts, the debt owing to them by *Mantell* was vested in the assignees, and therefore the proceedings of *Bibbins's* to execute the writ of inquiry, and to final judgment after they became bankrupts, was contrary to law and the several statutes of bankrupt, and that the assignees ought to have sued out a *scire facias* upon the interlocutory judgment obtained by *Bibbins's* against *Mantell* in *Trinity* term last, for him to shew cause why the assignees should not have a writ of inquiry of damages, and be at liberty to proceed to recover final judgment thereon for the benefit of themselves and the rest of the creditors. 2. It was also objected that bankruptcy before the final judgment was an abatement of the suit, that *Bibbins's* were then dead in law, and could not proceed one step further.

For the plaintiffs the assignees it was answered, 1st, That all the statutes concerning bankrupts are one system of laws made for the benefit of creditors, and that a bankrupt may act for their benefit, although he cannot do any thing to the contrary. The judgment hath been fairly obtained, and the present writ of *scire facias* shews the assent of the assignees to what the bankrupts have done in proceeding to final judgment. In the case of *Priddle v. Thomas* last *Hilary* term *B. K.* the parties were at issue, and notice of trial was given; before the trial *Priddle* became a bankrupt, and Mrs. *Pritchard* was chosen assignee; the court upon motion permitted the trial to go on in the name of the bankrupt *Priddle*, upon the assignees undertaking to pay the costs of suit in case a verdict should be given for the defendant. *Alexander Holt* recovered a judgment, anno 17 *Car.* 2. against the defendant, and had a *testatum scire facias* to the tertenants; they appear and plead, and there was a verdict against them at the assizes in *Suffolk*, and judgment thereupon; afterwards *Holt* became a bankrupt, and the commissioners assigned the original judgment to *Plummer*, who in *Michaelmas* term 7 *W. 3.* moved the court that it might be entred to intitle him to the benefit of the judgment upon the *scire facias*, which was ruled accordingly without bringing a new *scire facias* (*quod nota* says the reporter) 5 *Mod.* 88. *Plummer v. Lea*, which case shews that the courts will give the creditors all the assistance they can for the speedy recovery of debts owing to the bankrupt, without turning them about. A man has a judgment in debt, then becomes a bankrupt, and afterwards sues out execution; the money is levied and brought into court, the assignee moves that it may not be paid to the plaintiff the bankrupt, surmising that the judgment was assigned to him; the court detained the money until the assignee brought a *scire facias* to try the bankruptcy; from this case it appears that if it had appeared on record to the court that the plaintiff was a bankrupt, they would have ordered the money to be paid to the assignee; in the case at bar it appears by the defendant's own plea that *Bibbins's* are bankrupts, and

whether *Mantell* is in execution at the suit of *Bibbins's*, or the assignees, it can make no difference to him. After a writ of inquiry executed, the defendant moved to stay the proceedings; the plaintiff since the action brought having been discharged by the insolvent debtors act, and having assigned his debts and effects for the benefit of his creditors, the court refused to make any rule, and said the action brought before the discharge and assignment must proceed. *Hedley v. Brown*, 2 *Barnes* 308. This case shews that the court permitted the assignee for the benefit of the creditors to proceed in the name of the debtor to recover judgment in his name.

Wilmot Chief Justice: When a motion was made in the cause of *Bibbins v. Mantell* in last *Michaelmas* term, I had some little doubt whether the assignees ought not to have sued out a *scire facias* upon the interlocutory judgment, but upon further and more mature consideration I think we may, with justice, give judgment for the assignees in this case; courts of law have interfered equitably in many cases of bankrupts, and if they can see upon the face of the whole record that the assignees are intitled to recover, they will use their utmost sagacity and *astutia* to give them judgment; that they are intitled to this debt is as clear as the sun, and the bankrupt has no right to receive this money; therefore unless we are bound down by the rules of law and former determinations, we will not turn the assignees round; it is truly said that the statutes of bankrupt form one body or system of law made for the benefit of creditors, and every act done by the bankrupt for the benefit of his creditors, the courts will liberally construe to be right and just, but contrary of acts done to the injury or disadvantage of creditors. It has been objected that the right and property of this debt was so absolutely divested out of the *Bibbins's* when they became bankrupts by the statutes, that they could not stir one step further in the cause against *Mantell*; in answer to this it appears on this record that *Bibbins's* had obtained an interlocutory judgment, and the court awarded a writ of inquiry before the bankruptcy; the defendant *Mantell* afterwards had no day in court, nor could he afterwards plead any thing to the action; the taking the inquisition and entering final judgment were only the conclusion and necessary consequence of the interlocutory judgment, for the court themselves, if they had so pleased, might upon the interlocutory judgment, have assessed the damages, and thereupon given final judgment before *Bibbins's* became bankrupts, and the inquisition is only a matter of course taken to inform the conscience of the court. There is no foundation to say that the bankruptcy was an abatement of the suit against *Mantell*, for suppose the effects of the bankrupts should amount to pay 20s. in the pound and more, surely they might afterwards proceed to final judgment; the final judgment cannot be void, for the interlocutory judgment intitled *Bibbins's* to recover something, which by the

the inquest was ascertained; the assignees by bringing this *scire facias*, have expressly affirmed the act of *Bibbins's* proceeding to final judgment. There is no doubt but a *scire facias* lies upon an interlocutory judgment; and it was objected that the assignees ought to have taken up the cause at that period; but if they had, this plea does not lie in the mouth of the defendant in answer to the assignees; indeed if the bankrupts themselves had brought a *scire facias*, this plea might have been good, because after they became bankrupts, perhaps they could have no legal right to have execution; upon the whole, the defendant's plea discloses such facts as shew the assignees ought to recover, and therefore I am very clearly of opinion they must have judgment. The case of *Priddle* and *Thomas* is not so strong as this.

12 Mod.
How v. Ta-
ton.

1 Mod. 93.

Batburst Justice: The action certainly doth not abate upon the plaintiff's becoming a bankrupt, nor doth it abate if a defendant becomes a bankrupt; we *here* must look on this judgment as a right judgment while it remains unreversed by another court, we cannot say that a judgment of our own pronouncing is nul and void in law. Judgment for the assignees *per curiam*, *absente Gould J.*

—*versus* Cooper. C. B.

IN replevin, the defendant avows under a distress for rent due from the plaintiff to him upon an assignment of a lease of a term for years to the plaintiff, in which assignment there is no clause of distress; the single question is, Whether this is such a rent for which a distress lies, there being no reversion in the defendant. It was said for the defendant that although rent be incident to the reversion, yet it is not an inseparable incident, and therefore it may be severed from the reversion; and although there is no clause of distress in the assignment of the term, yet the rent reserved thereupon may be considered as rent-seck, and distrained for by the statute 4 Geo. 2. c. 28. *sec. 5.* and that it appears clearly to be the intent of the parties that the plaintiff should pay rent to the defendant; this case was so clear, that the court gave judgment for the plaintiff without hearing his counsel.

Lessee for
years assigns
his term, he
cannot distrain
for rent.

Curia: There are two ways of creating a rent; the owner of the lands either grants a rent out of it; or grants the lands and reserves a rent; there is no such thing as a rent-seck, rent-service or rent charge issuing out of a term for years. *Bro. Dette, pl. 39.* cites 43 Ed 3. 4. *per Fynchden* Ch. Justice C. B. If a man hath a term for years, and grants all his estate of the term rendering certain rent, he cannot distrain if the rent be in arrear; this case is law and in point; therefore if the avowant will recover what is owing to him from the plaintiff, he must bring his action upon the contract.

Judgment for the plaintiff *per totam curiam.*

Smith *versus* Cattle. C. B.

Action for
holding to bail
in an inferior
court when no
more than
30s. was due.

SPECIAL action upon the case, wherein the plaintiff declares that whereas by the laws of this realm no person ought to be arrested without a probable cause yet the defendant falsely and maliciously, without any probable cause in the court at *Daventry* sued out a precept against the plaintiff in an action upon the case, which the defendant falsely and maliciously caused to be indorsed for bail for 2*l.* 14*s.* against the plaintiff, and thereupon caused the plaintiff to be arrested and held to bail for that sum; and the plaintiff avers that he only was indebted to the defendant in 30*s.* and no more, and that the defendant had no right to hold him to bail by the law and custom of that court for that sum, whereas he maliciously held the plaintiff to bail for 2*l.* 14*s.* in order to oppress him, to his damage; upon Not guilty there was a verdict for the plaintiff; and now it was moved in arrest of judgment, that it did not appear upon the face of the declaration for what sum the court at *Daventry* could hold to bail; but *per curiam*, since the statute of 12 Geo. 1. for preventing frivolous and vexatious arrests, no person can be held to bail in an inferior court for less than 40*s.* and here it is averred that no more than 30*s.* was due to the defendant, and that he had no cause of action whereby by the law or custom of the court at *Daventry* the plaintiff ought to be held to bail; the declaration is well enough; the sting of all these kind of actions is *malice* and *falsehood*, and injury done in pursuance thereof; Judgment for the plaintiff.

Rogers *versus* Payne. C. B.

Covenant for
payment of
money cannot
be discharged
without deed.

Velv. 192.
Cro. Jac. 254.

IN covenant, breach assigned for non-payment of a sum of money; the defendant pleads a discharge (in the nature of a release) without deed in satisfaction of all demands; upon demurrer it was objected for the plaintiff, that the plea is ill, for that a covenant to pay money which is by deed, cannot be discharged without deed. 6 Rep. 44. *a. Blake's case*; and of that opinion was the court, and gave judgment for the plaintiff.

Drage.

Drage, Esq; *versus* Brand, C. B.

THE defendant's lease of a farm belonging to the plaintiff, ending at *Lady-day* 1766. and being desirous to hold the farm another year, articles of agreement were executed between the plaintiff and defendant, dated the 26th of *March* 1766. that the defendant should hold the farm from the 25th *March* 1766. for one year longer, and the defendant thereby agreed to hold the same for that term, and not to cut any tree or trees growing thereupon under the penalty of 500*l.* and would leave the fences in good repair; the defendant having very much misused the farm, and cut down almost every tree growing thereupon, the plaintiff brought an action of debt for the penalty of 500*l.* and alledged that the defendant had cut down a great many trees (mentioning them) and that he did not leave the fences in good repair, whereby an action hath accrued to the plaintiff to have and demand of him the said penalty of 500*l.* Upon *nil debet*, there was a verdict for the plaintiff, that defendant owed the debt, and they found one shilling damages, and 4*os.* costs.

Debt for a penalty in articles; the jury ought to assess damages upon the breach assigned, according to the stat. of 8 & 9 W. 3. cap. 10. and shall not find the debt or a *venire facias de novo* shall be awarded.

Whereupon it was moved for the defendant upon the 8th and 9th of W. 3. cap. 10. that the jury ought to have taken into consideration and assessed the real damages done to the farm, upon the breach assigned in the declaration, and if this verdict is to stand, the plaintiff may take out an execution for the whole penalty of 500*l.* and his costs, and the defendant will be obliged to go into Chancery to seek relief, which the statute was made to prevent. After hearing counsel on both sides, and time taken to consider, the court was of opinion that a *venire facias de novo* ought to be awarded; that the statute was made for the benefit of defendants, that the plaintiff was bound down by the statute, and obliged to assign as many breaches in this case as he pleased, that the damages might be assessed by the jury upon each breach; and it is not in the plaintiff's election to take a verdict for the whole debt, as he has done in the present case; and there must go a *venire facias de novo*, the verdict being defective.

plaintiff's note (1)

Sup. 374. 350.

1002 & 623

Final judgment against a prisoner in Michaelmas term last, the plaintiffs being then bankrupts, assignees could not charge him in execution in Hilary term last, being prevented by the defendant's plea to their scire facias.

Bibbins and others *versus* Mantell a prisoner. C. B. 3 T. 437.

THE plaintiffs having proceeded to final judgment in last Michaelmas term, when the defendant was a prisoner, and the plaintiffs not having charged him in execution in last Hilary term, according to the rule of the court, it was now moved on the behalf of the defendant that he might be discharged out of prison by *superfedeas*; to which it was answered and admitted, that the plaintiffs did proceed to final judgment against the defendant in last Michaelmas term, but the plaintiffs being then bankrupts could not legally charge him in execution, neither could the assignees under the commission of bankrupt charge him, without first suing out a *scire facias* to shew cause why they should not have execution upon the judgment against the defendant, which they accordingly with due diligence sued out returnable the first return of last Hilary term, to which the defendant pleaded a plea which was held to be bad upon a demurrer, in this very term, (see the case of *Hewitt & al Assignees, &c. v. Mantell before*) and therefore the defendant himself by pleading a bad plea has hindred the assignees from charging him in execution in last Hilary term, which they might have done if he had not pleaded.

12 Mod. 93.

Curia: Bibbins's the bankrupts could not charge the defendant in execution in last Hilary term, because the assignees were intitled to the benefit of the judgment, had then brought a *scire facias* upon it, and, if Mantell has any lands, (which he may have for any thing we know) they may perhaps choose an *Elegit* against his lands, and not to charge his person in execution; the rule to shew cause why the defendant should not be discharged by *Superfedeas* was discharged, the assignees having proceeded with due diligence.

Denny *versus* Trapnell, Esq; C. B.

An inquisition taken before two undersheriffs extraordinary let aside, for the high sheriff can appoint no more than one undersheriff extraordinary. 4

TRESPASS for taking and carrying away an anchor of the plaintiff at Ipswich, of the value of 6*l.* judgment by *nil dicit* was of last Hilary term, and a writ of inquiry of damages executed in the last vacation, April the 14th (returnable the first return of the present term) before two persons undersheriffs extraordinary appointed by deputation under the hand and seal of the high sheriff of Suffolk for that purpose; the jury assessed 77*l.* for the plaintiff's damages; this term began upon Wednesday the 20th of April, and upon Saturday the 23d, being the 4th day in term, at 3 o'clock in the afternoon the plaintiff might have signed final judgment if he had pleased, but not having so done, the defendant on Monday the 26th of April moved the court that the inquisition might be set aside,

aside, for two reasons, first because the high sheriff cannot depute two persons to take an inquest, for if he can appoint two, he can appoint twenty two, or any other number; 2dly, Because the damages of 77*l.* assessed for an anchor worth no more than 6*l.* are excessive; whereupon a rule was made to shew cause why the inquisition should not be set aside; upon shewing cause for the plaintiff it was objected that this motion was like a motion in arrest of judgment, or for a new trial, and therefore the defendant not coming to move it within the first four days in term, according to the course of the court, this rule ought not to have been made; *sed non allocatur, per curiam* the defendant made the motion before final judgment was assigned, and so came soon enough. 2dly, It appeared by affidavits on the behalf of the plaintiff, that he was a fisherman, that his vessel was lying at anchor in the port of *Ipswich*, and ready to sail in order to fish for sprats, that such fisherman, in the sprat season, can get 20*l.* per week clear; that the defendant distrained the anchor worth 6*l.* for a toll of 8*d.* pretended to be due for every fishing vessel there, and that by the taking away the anchor the plaintiff was delayed in his voyage above two weeks, and that the defendant upon the executing the writ of inquiry made a defence, and therefore it was said the damages were not excessive; 3dly, It was said that the practice of appointing an under-sheriff extraordinary upon such occasions as this, had been often allowed by the court of King's Bench; and 4thly, That the plaintiff's most material witness was gone to sea, and he did not know when he would return, and therefore the inquisition ought not to be set aside. For the defendant it was replied, that the practice of the King's Bench of allowing the appointment of one under-sheriff extraordinary was right enough, but there is no instance of an appointment of two under-sheriffs extraordinary in one cause; and that the defendant would admit the evidence before given by the now absent witness.

If final judgment be not before signed, a motion to set aside an inquisition may be made the 6th day in term after the writ of inquiry is returnable.

Curia: We shall say nothing as to the damages, whether they are, or are not excessive; there is no instance of deputing two under-sheriffs extraordinary to take an inquest, for if the high sheriff may appoint two, he may appoint twenty or more, if he can exceed one, no line can be drawn to limit the number; besides, it appears that the sworn under-sheriff lived in the same town, and therefore the writ of inquiry ought to have been executed before him; let the inquisition be set aside, and the writ of inquiry be executed before the judge at the next assizes for the county of *Suffolk*, and the evidence of the absent witness be admitted at the defendant's request.

Serjeant *Leigh* for the defendant; Serjeant *Foster* for the plaintiff.

Garratt *versus* Mantell a prisoner. C. B.

A prisoner brings a writ of error, the plaintiff is not obliged to charge him in execution the 2d term after judgment,

RULE to shew cause why the defendant should not be discharged out of custody by writ of *superfedeas*, the plaintiff not having charged him in execution according to the course of the court; upon shewing cause it appeared to the court that final judgment for 6000*l.* debt, after a verdict was signed and entred in the vacation after last *Michaelmas* term, that upon the 27th day of *January*, the 4th day in the last term, the defendant was brought up in order to have been charged in execution, but a writ of error was then brought and allowed, but no bail was put in thereupon until the 30th of *January*; that an injunction bill was filed by defendant against the plaintiff, but no injunction was sued out.

for a plaintiff shall have every day in the 2d term to charge a prisoner.

Curia: The plaintiff shall have the *whole*, viz. every day of the second term after final judgment signed, to charge a prisoner in execution, and it appears the defendant has hindred the plaintiff from so doing, several days in last term, by bringing a writ of error, therefore the rule must be discharged.

Freeland *versus* Hunt. C. B.

After a defence made on a writ of inquiry, the defendant not allowed to take advantage of a mistake in the declaration,

IN covenant, on a deed of assignment by the defendant of particular debts, and he covenants that none of those debts were satisfied; judgment by default, and a writ of inquiry executed; a fatal mistake being now found out in the declaration, it was moved that the interlocutory judgment might be forthwith entred upon record agreeable to the declaration delivered, and the roll be brought into the proper office, and that the defendant might have four days to move in arrest of judgment after the roll is brought in. Upon shewing cause it appeared that the defendant attended the executing the writ of inquiry by counsel, and cross examined the plaintiff's witnesses.

Curia: We lament that entries on the roll are not made at the times when they ought to be made; the rule must be discharged, because the defendant did not rely on the mistake, but has made a defence on the executing the writ of inquiry.

g. It is no more moving in arrest of judgment after trial.

In the Common Pleas

Nota; Trinity term in the 8th year of *King Geo. 3.* began on the 3d day of *June* 1768. when the court ordered, that upon process returnable the *first, second, or third* return of any term, if the plaintiff declare within four days before the end of the term, the defendant shall plead without an imparlance.

Trinity Term

8 Geo. 3. 1768.

Bates *versus* Barry, Esq; C. B.

THE plaintiff brought a former action against the defendant, held him to bail for 70*l.* declared against him in an action upon the case upon a special agreement in writing under the defendant's hand and seal, not stamped, and the cause being at issue, the plaintiff's attorney found out he had made a mistake in declaring in an action upon the case, the writing being made and executed in *Ireland*, where no stamps are necessary, was a good deed and the plaintiff ought to have declared in *covenant*, therefore he discontinued that action upon payment of costs; and having now brought this second writ for the same cause of action, and arrested the defendant a second time, whereupon the sheriff hath returned a *cepi corpus*; it was moved that the defendant might be discharged out of the custody of the sheriff upon entering a common appearance, for that it was oppressing and harrassing the defendant to arrest him, and oblige him to put in special bail twice for the very same cause of action.

A defendant was held to bail a second time for the same cause of action, after plaintiff had discontinued the first writ, by reason of a mistake.

Curia: This seems to have been a mere mistake, and not done with any intent to oppress or harass the defendant; if any such intent had appeared, the court would certainly have discharged the

PART II.

5 E

defendant

defendant upon entring a common appearance, but it would be too much to say the plaintiff in this case should lose his bail by a mere slip of his attorney; so the rule was discharged. *Absente Bathurst J.*

Evans versus P——an attorney of the C. B.

If an attorney of this court doth any thing wrong quatenus an attorney, in an inferior court, this court will oblige him to answer the complaint.

EVANS and one C. made an affidavit against P. that he had been guilty of some male practice with respect to a bill of costs for business done in the county court of *Monmouth*, whereupon it was moved that he might answer the matters of the affidavit; to which it was objected on the behalf of P. that this was a transaction in an inferior court, and this court would not intermeddle therein; and cited a case of *Henderson v. Ilderton*, *Hilary 3 Geo. 3. C. B.* when, upon an application of this sort, this court though they had no power to proceed against an attorney of the court in summary way, charged with a misbehaviour in his practice in an inferior court (the Mayor's court of *Newcastle*,) to make him answer the matters of an affidavit, because they could do nothing with the cause, but must leave *that in statu quo*

Curia: An attorney cannot practice in an inferior court if he is not an attorney of a superior court, and that is the reason why this court interferes; where deeds are put into an attorney's hand (who happens to be concerned for the adverse party) and not redelivered, this court interferes; and if an attorney of this court doth any thing wrong *any where quatenus* attorney, this court interferes, whereupon Mr. P. agreed to accept of a less sum than he had demanded in the county court of *Monmouth*, and the matter was compromised at the bar.

Perkin versus Proctor and Green. C. B.

Trespass lies against the assignees under a commission of bankruptcy sued out against a victualler, or any other person not liable to be bankrupt.

TRESPASS for entring the plaintiff's house, and disturbing him in his possession thereof; the second count is for expelling him from the possession thereof; upon the general issue this cause was tried before the Lord Chief Justice *Wilmot* last *Easter* term at *Westminster*; verdict for the plaintiff, damages 40*l.*

The evidence given at the trial was as follows, *viz.* That the plaintiff on the 8th of *April 1763.* purchased of one *William Goodall* a publican his interest in a term of years in a house he was then in possession of, and held by lease (being the house in which, &c.) which lease had been some time before deposited in the hands of the defendants, who are brewers, (of whom *Goodall* bought his beer)

beer) as a *security* for a debt due to them from *Goodall*: that *Goodall* granted to the plaintiff an under-lease, for which he paid *Goodall* 40*l.* for the good-will of the house, and paid him 35*l.* for the goods in the house; that upon the 26th of *April* 1763. a commission of bankrupt issued against *Goodall*; he was thereupon declared a bankrupt, and the messenger seized all the goods in the house, which were bought by the plaintiff of *Goodall* with the knowledge and upon the recommendation of the defendants; the plaintiff continuing in possession under his under-lease, and the defendants being assignees of *Goodall*, brought an ejectment as assignees against the plaintiff, recovered, and put one of their servants in possession of the house: that the plaintiff having at an expence got another public house in the same street, applied for a licence, which was much opposed by the defendants, but the justices being informed how the plaintiff had been treated by the defendants, did remove the licence to the plaintiff, and said they never would license the house so taken possession of by the defendants; and within twelve months afterwards the defendants surrendered their possession under the judgment in ejectment to the original landlord, by which the plaintiff's interest in the house was lost; that the plaintiff hearing of the late determination in the court of King's Bench, that a victualler or common alehouse-keeper is not liable to a commission of bankrupt, brought *trover* for the goods and recovered 35*l.* the sum he paid for the same, and has now brought *trespass* and recovered the sum of 40*l.* damages. *Nota*, the commission of bankruptcy was superseded the 2d of *February* 1768,

It was now moved for a new trial, for two reasons; first that *trespass vi & armis* doth not lie in this case; 2dly, that 40*l.* damages are excessive; upon shewing cause it was answered for the plaintiff that *trespass vi & armis* is the proper action, and that this is like the case where an execution has been executed upon an irregular judgment, which is afterwards vacated: *trespass vi & armis* lies against the plaintiff in that judgment. 2dly, The damages in this case are what the plaintiff hath really sustained, for he gave 40*l.* for the good will of the house, they belong to the jury, and are not excessive. In answer, it was said for the plaintiff, that this action was brought before the commission was actually superseded, for the Lord Chancellor's order for superseding it was only made two days before the trial, and that while the commission was subsisting they acted under a proper authority, and could not be trespassers; 2 *Roll. Abr.* 555, 6. Y. pl. 4. he who comes to a thing lawfully cannot be a trespasser: to which it was answered, that the cause determined in *Banco Regis*, *Easter* term 1767. of *Rolls* versus *Rawlinson*, was *trover* brought in a similar case to this, before the commission was superseded; *per Clive* justice, *Turner* versus *Felgate*, 1 *Lev.* 95. upon a judgment vacated an officer is excused for executing

cuting an execution, but the party is not; the court took a few days time to consider, and then gave judgment to the following effect.

Curia: If the late resolution in *B. R.* that a victualler cannot be a bankrupt, had not happened, probably the present action would never have been brought; and the Chief Justice, who tried the cause, thought it a very hard case, and did recommend it to the jury to find small damages, but they found 40 *l.* which he thought they measured by the sum which the plaintiff paid *Goodall* for the good-will of the house. It is now moved that, in point of law, trespass will not lie; 2^{dly}, That the damages are excessive; the present action is against the persons themselves who sued out the commission of bankrupt, who are bound to support the legality of their acts, and is not like the case of an officer executing a writ of execution upon a judgment, which is afterwards vacated; we are all of opinion that the commission of bankruptcy is void, and of no avail; the jurisdiction concerning bankrupts is confined to particular persons and cases; as, that the person subject to a commission must be a trader, must be indebted in such a sum, must do some particular act, &c. &c. The court of Chancery acts herein solely upon the application of the party petitioning, at whose peril the commission issues, and if he sues it out upon any false suggestion, the law gives a remedy against him to the party whose liberty and property is thereby invaded; there are a variety of commissioners whose power and jurisdiction are limited and confined, which if they exceed, the law will give remedy against them; and where courts of justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non jndice*, the case of the *Marshalsea*, 10 *Rep.* 76. *a. b.* where there is no jurisdiction at all there is no judge, the proceeding is as nothing; this is the very case of the *Marshalsea*; the party in this case is no trader, there is no foundation to build a commission upon, the commissioners had no power at all; where a rate is unduly taxed, the warrant of the justices of peace for levying thereof will not excuse the churchwarden or overseer of the poor who distrains for it; *Nicholas v. Walker and Carter*, *Cro. Car.* 395. And it is not like where an officer makes an arrest by warrant out of the King's court, which if it be error the officer must not contradict, because the court hath general jurisdiction; but here (says justice *Croke*) the justices of the peace have but a particular jurisdiction. The case of *Terry v. Huntington & al'*, *Hard* 480. is a very strong case. In trover for goods levied by warrant of the commissioners of excise, the question was, if they adjudge low wines to be * *strong waters* perfectly made, upon the *stat.* 12 *Car.* 2. *c.* 23. whether an action lies against the officer. *Per Hale* Lord Chief Baron, the commissioners have only a stinted, limited jurisdiction, and if they exceed it that does not

* Wines in *Hardr.* 480. which seems to be a mistake in the press.

take away the jurisdiction of this court. Special jurisdictions are circumscribed; 1. With respect to *place* as a *leet* or a *corporation*. 2. With respect to *persons*, as 10 *Rep.* the case of the *Marshalsea*. 3. With respect to the subject matter of their jurisdiction; and the statute limits their jurisdiction in all these three respects, and therefore if they give judgment in a cause arising in another place, or betwixt private persons, or in other matters, all is void and *coram non judice*, as if they should adjudge *rose water* to be *strong water*. Where a judgment is vacated for irregularity the party is never excused, if an execution is executed thereupon; yet the sheriff's officer is excused because he has the King's writ to warrant him. *Turner v. Felgate*, 1 *Lev.* 95. 1 *Sid.* 272. Though these cases have been sometimes grumbled at, yet they are good law. *Carth.* 275. 2 *Stra.* 509. In the case of an irregular judgment against the plaintiff and a *capias ad satisfaciendum* executed thereupon, in trespass and imprisonment the party and the officer joined in a plea of justification under the writ; and the officer was therefore held guilty as well as the party; but where a judgment is reversed for error it is different, and stands good until reversed; one case is the fault of the party himself, the other is the error of the court. *Smith versus Dr. Bouchier and others*, Vice-chancellor, Judge, Gaoler and Party, in a cause in the Chancellor's court of the university of Oxford; the question arose upon a custom, that a plaintiff making oath that he has a personal action against any person within the precincts of the university, and that he *believes* the defendant will not appear but run away, the judge may award a warrant to arrest him and detain him till security be given for his answering the complaint; on the 7th of *August* 1731. the defendant *Bouchier* having the privilege of the university made a complaint to the defendant *Shippen* the Vice-chancellor of a personal action against the plaintiff *Smith* to his damage of 1000*l.* according to his estimation, and that he *suspected* the plaintiff *Smith* would run away, that he took his oath of and upon the truth of the premises, upon which a warrant was granted to the other defendants, who arrested *Smith* and kept him in prison eight days for want of sureties. The court held that the party must swear to his *belief* of the defendant's design to run away, in order to give the Chancellor's court this jurisdiction, and that swearing that he *suspected* the defendant would run away was not sufficient, and that nothing but *belief* would do, therefore the whole was *coram non judice*; and Lord *Hardwicke* was of opinion that *trespass and false imprisonment* well laid against the Vice-chancellor, Judge, Gaoler, Officer, and all of them; and though Sir *John Strange* in his report of this case, 2 *Stra.* 694. says that the officer and gaoler might have been excused if they had justified without the bailiff or Vice-chancellor, yet it seems they could not, as the whole proceeding was *coram non judice*, and a mere nullity, (therefore *quære* as to that point.) See the case of

Martin and *Marshall* (the mayor of *York*) and *Key*, a serjeant at mace, *Hob.* 68. in trespass and false imprisonment, where the prescription was for the mayor of *York* to direct precepts for appearance in the court of Chancery *there*; the court held such precepts must be intended to be made in writing, and because the justification did alledge that the command given by *Marshall* the mayor to *Key* the officer to take *Martin* was by word the plea was held ill; this is against a judge of a court acting where he had a limited jurisdiction, but had no jurisdiction of process *ore tenus*, so the action well laid against him; there must be a jurisdiction of the *process* as well as of the *person* and cause.

Hardr. 478.

In the case at bar we lay the superseding the commission of bankruptcy intirely out of the case, as if it had never been superseded at all; the commissioners had no more power to act under the commission of bankrupt against *Goodall* who was a victualler than if he had been a divine, a lawyer, or a physician; although it may be thought hard to adjudge a man a trespasser in a case heretofore doubtful, yet the law cannot bend to particular cases and it is more for the general utility to suffer particular hard cases, than to give usurped authority any effect at all, the hardship of particular cases is thereby most amply compensated to the public.

As to the damages, the Lord Chief Justice was pleased to say, he wished they had been 40s. instead of 40l. that he thought there was a foundation for the jury to have lessened them, but they thought otherwise, and they (he said) are the constitutional judges as to damages, and there must be some very extraordinary conduct in a jury to induce the court to meddle with damages. So the *postea* was ordered to be delivered to the plaintiff, who had judgment.

John Connor *versus* John Connor. C. B.

What is sufficient certainty in a declaration.

Dyer 70. b. margine.

Cro. Eliz 267.

JOHN Conner of Barnett was summoned to answer *John Connor* of a plea that he render to him 68l. which he owes to him and unjustly detains, &c. and whereupon the said *John Connor* (declares upon a bond); the defendant craves oyer of the bond and condition, which is set forth, whereupon the defendant demurs in law, and shews for special cause of demurrer that it does not appear that the plaintiff hath any cause of action, or that the defendant is indebted, or that he executed the bond: it was objected, that it did not appear to the court which *John Connor* executed the bond, because there is no distinction by way of addition to the name of *John Connor* after the first line of the declaration; to which it was answered.

answered and resolved by the court, that sufficient certainty appears upon the record that *John Connor of Barnett* is indebted upon a bond executed by him to *John Connor of Friday-street*, the oyer whereof is set forth; and therefore *John Conner of Friday-street* must have judgment against *John Connor of Barnett*.

Bro. Addition
pl. 47. pl. 16.
Bar. pl. 76.

Michaelmas Term

9 Geo. 3. 1768.

Rogers *versus* Carter, Esq; C. B.

TRESPASS against the defendant a justice of the peace for taking and carrying away the plaintiff's gun from him; upon the general issue Not guilty, which was tried before Lord *Mansfield*, upon the home circuit last summer, there was a verdict for the plaintiff; and serjeant *Nares* having moved for a new trial, Mr. Justice *Gould* now reported to the court the facts proved at the trial, as they had been stated to him by Lord *Mansfield*, viz.

A game-keeper of a lord of a manor has a right to carry a gun any where out of the manor.

That Lord *H.* Lord of the manor of *Ringwood*, by writing under his hand and seal on the 26th day of *August* last made and appointed the plaintiff his game-keeper within the said manor, which appointment or deputation was duly entred and registred with the clerk of the peace where the manor lies on the 27th of *August*; that on the 10th of *October* last the plaintiff hunted and beat for game in the said manor, and in a large field there sprung a covey of partridges; after their first flight he shot at them within the manor; they took a second flight, and the plaintiff pursued them out of the manor, but could not find them; as he was returning again to the manor of *Ringwood*, he was met by the defendant about three quarters of a mile distant from that manor, who asked him if Lord *H.* had qualified him; the plaintiff answered, "I have a deputation from the lord of the manor of *Ringwood*;" the defendant replied, You are now out of that manor," and

and demanded his *gun*, and took it from him, that the defendant did not shoot out of the manor, but was three quarters of a mile ~~out of the manor with his gun and dog with an intention to shoot~~ at game.

By the stat. 3 Geo. 1. c. 11. It is enacted, that no lord of a manor shall make any person to be a *game-keeper* with power to kill game, unless such person be qualified by the laws of this realm so to do; or unless such person be truly and properly a servant to the said lord; or be immediately employed and appointed to take and kill the game for the sole use of the said lord, and not otherwise.

It also appeared that the plaintiff was neither a qualified person to kill game by the laws of the realm, nor was properly a menial servant to the lord of the manor; whereupon two questions arose at the trial, *1st*, Whether from the facts proved, the plaintiff had been guilty of any offence against the game laws, so as to subject him to have his gun seized and taken from him by the defendant. *2d*, Whether, as the plaintiff was neither a qualified person, nor a menial servant to the lord, he could be appointed his *game-keeper*. Lord *Mansfield* thought the defendant had no right to seize the gun; and that it was not necessary that the plaintiff should be a qualified person, or a menial servant to the lord, in order to make him capable of having a deputation as a *game-keeper* from the lord of the manor; so the jury found for the plaintiff. But as the lords of manors and country gentlemen present at the trial were of different opinions about this matter, Lord *Mansfield* said he thought the best way was to move the court for a new trial without costs, and if he had thought this could not have been done, he would have made a case for the opinion of the court, or have directed the jury to have found a special verdict.

This matter was debated on *Friday November* the 18th by serjeant *Leigh* for the plaintiff and serjeant *Nares* for the defendant, and on *Monday* the 21st of *November* the court discharged the rule to shew cause why there should not be a new trial.

Curia: There are two questions; *1st*, Whether the plaintiff was a person qualified to receive a deputation from the lord of the manor to be a *game-keeper* at all.

2d, Supposing he is, whether the justice of peace (the defendant) under the *stat. 5 Ann. c. 14. s. 4.* had a right to take his *gun* from him, while he was *sporting*, for the purpose of killing game, for we think it will make no difference in the case, whether he *shot*, or not, out of the manor.

The

The *stat. 22 & 23 Car. 2. c. 25.* is the first act that introduces *Game-keepers*, whereby it is enacted that lords of manors, &c. may by writing under their hands and seals authorize *game-keepers* within their royalties to seize guns, &c. or other engines for taking or killing game. See this statute.

The *stat. 4 & 5 W. & M. c. 23. s. 4.* puts *game-keepers* upon a footing with the ancient keepers of parks, whereby it is enacted, that all lords of manors or their *game-keepers* may within their royalties resist offenders in the night-time in the same manner, and be equally indemnified as if such fact had been committed within any antient chase, park or warren. See this statute.

The *stat. 5 Ann. c. 14. s. 4.* adds power to the *game-keeper* to kill game upon the manor. See the statute.

The *stat. 9 Ann. c. 25. s. 1.* enacts, That no lord or lady of a manor shall make above *one game-keeper* within *one* manor with power to kill game, and the name of such person shall be entred with the clerk of the peace, such entry to be made and viewed without fee. See the statute.

The *stat. 3 Geo. 1. c. 11.* reciting the *stat. 5 Ann. c. 14.* and the *stat. 9 Ann. c. 25.* and the abuse of those statutes, by lords of manors granting deputations to the farmers, tenants and occupiers of the lands within their respective manors to be *game-keepers*, with power to kill and destroy the game, which practice tended to the destruction of the game; for remedy whereof it was by this statute enacted, that no lord or lady of a manor shall appoint any person to be a *game-keeper* with power to kill game, unless such person be qualified, or be truly a servant to the said lord or lady, or immediately employed to kill game for the sole use of such lord or lady, &c. See the statute.

As to the first question, we are all of opinion that the plaintiff was a person properly qualified to receive a deputation from the lord of the manor to be a *game-keeper*, although he was neither a qualified person, nor a menial servant to the lord of the manor; that this *stat. 3 Geo. 1.* never was meant to check or hinder lords living at a distance (from their manors) from appointing any person whatsoever to kill game for the immediate use of the lord; if it was otherwise this act would take away the right of every lord living at a great distance from his manor; we therefore are of opinion that the plaintiff was well qualified to kill game in the manor of *Ringwood*, and consequently to carry a gun for that purpose.

The plaintiff being so qualified, the second question arises upon the *stat. 5 Ann. c. 14. sec. 4.* whether the justice of peace under that statute had a right to take his gun from him while he was sporting for the purpose of killing game in another manor, out of the manor of Ringwood, for we take it to be true that the plaintiff intended to kill game when he was out of that manor of Ringwood, and when the gun was taken from him; and I think it makes no difference in the case whether he shot at game out of that manor of Ringwood or not, if he had killed game where he was not a game-keeper, he might have been convicted in the penalty of 5*l.* but he was intitled to keep and have dogs, guns and nets for the taking and killing of game any where; upon the debating this case at the bar, cases were cited from the civil law books and our law books touching the property of game and other creatures *feræ naturæ*, and the lawfulness of pursuing the same, but we shall not take notice of those matters, because we are now to judge upon a law of penalties. and the words of penal laws must in all cases be strictly pursued; if the words be doubtful, courts of justice will explain and construe them in favour of the subject; if they be plain and clear words, the office of the court is *jus dicere et non dare*, and we must not rack and torture words to punish the subject.

The first part of *sec. 4.* of this *stat. 5 Ann.* gives a penalty of 5*l.* against any person not qualified for keeping an engine to kill game, and then proceeds to give justices of peace and lords of manors power to take away the game, and such engine in the custody of such person not qualified to keep the same; but game-keepers are all qualified to keep such engines, therefore are not the objects of this clause.

But it is objected the plaintiff was using the gun to kill game out of the manor of Ringwood; the answer is, he had a right to keep it any where, and if he killed game with it out of the manor he might have been convicted in the penalty aforesaid, but the justice had no right to take the gun from him; it would be confounding the right of keeping with the right of using the gun to say otherwise, we cannot think the legislature had any such meaning.

The acts of parliament come from lords of manors themselves, who most commonly furnish their game-keepers with dogs, guns, nets, &c. we cannot think their property was intended to be put in the power of their game-keepers to forfeit the same, whenever they might please to exceed their authority under the deputations. By the *stat. 22 & 23 Car. 2. Game-keepers* themselves are impowered to seize guns; what? shall a game-keeper in the very next manor to mine have a power to take my game-keepers's gun if he happen to be trespassing in my neighbour's manor? this would be a humiliating disgrace indeed, and could never be meant by the legislature,

and if *game-keepers* were permitted to seize one another's guns, there would be a kind of a *border-war* among them; if this was a doubtful case, we should incline to the same opinion we are of, to prevent breaches of the peace; but it is a clear case, and the *game-keeper* is neither within the words or meaning of the *stat. 5 Ann. c. 14. s. 4.* Upon the whole we are all of opinion that the gun of a *game-keeper* of a manor cannot be seized either *cundo* or *redeundo*, or any where else, and that the defendant the justice of peace had no right to take away the plaintiff's gun from him; the rule to shew cause why there should not be a new trial was discharged. *Per totam curiam.*

Hilary Term

7 Geo. 3. 1769.

Freeman *versus* Jones a surviving partner with one Napleton.

CASE upon promises for goods sold and delivered to the defendant and one Napleton his late partner deceased; the declaration was of *Easter term* last, in *Trinity term* last the defendant pleaded a bond given by him and Napleton in satisfaction, in *Michaelmas term* last the plaintiff replied to the country; now in the beginning of the present term Serjeant *Burland* moved that the defendant upon payment of costs might have leave to withdraw his *special plea* and plead the *general issue*, upon an affidavit that the special was plea pleaded by the mistake of the defendant's attorney, and that the defendant had a good defence to make upon the general issue; upon shewing cause Serjeant *Jephson* for the plaintiff produced an affidavit that the plaintiff's only material witness was gone to the *West-Indies* since the issue joined last term. Serjeant *Burland* in answer said this had often been done, where the plaintiff had not been delayed, as in this case he had not, for the plaintiff could not have tried his cause before this term

The court refused to give the defendant leave to withdraw a special plea, and plead the general issue.

Per

Per curiam, This has frequently been granted after a replication in some cases, but here the plea goes to the action, it was pleaded so long ago as last *Trinity term*, and the defendant has *laid by* all last *Michaelmas term*, and there is no reason to let the defendant withdraw this special plea and plead the general issue; the rule was discharged *absente Clive Justice*.

Callaghan an Attorney, executor, &c. *versus* Harri^s
and his wife. C. B.

Ac etiam to answer the plaintiff in a plea of trover, &c. is well enough, though it would have been more clerk-like to have said in a plea of trespass upon the case for converting the plaintiff's goods to his use.

THE plaintiff sued out an *attachment of privilege* whereby the sheriff was commanded to attach the defendants to answer the plaintiff in a plea of trespass, and also that the defendants answer the plaintiff according to the custom of the said court in a *certain plea of trover*, and for converting of the goods and chattels of the said plaintiff as executor as aforesaid for one hundred and twenty-four pounds.

The defendants having been arrested upon this writ and held to special bail, serjeant *Nares* moved for a rule to shew cause why a common appearance should not be accepted for the defendants, alleging that the *ac etiam* in this writ doth not particularly express the cause of action as the statute of 13 Car. 2. c. 2. s. 2. directs; for that there is no such cause of action as a *plea of trover*, but it ought to have been in a *certain plea of trespass upon the case* for converting the goods and chattels of the plaintiff to the defendants use to the plaintiff's damage of 124*l*.

Upon shewing cause it was said by serjeant *Glynn* for the plaintiff, and resolved by the court, that the cause of action is fully and clearly expressed, and although the *ac etiam* be not exactly clerical, yet nobody who reads it can doubt of the cause of action; besides, since the statute of *ac etiam* 13 Car. 2. the statute of 12 Geo. 1. cap. 29. hath enacted that no person shall be held to special bail before an affidavit be made and filed of the cause of action, which hath been done in this case, so that the defendants have had notice from the affidavit of the cause of action, and if *that* affidavit be sufficient, the court cannot admit of a common appearance. The rule was discharged.

Nota; The 4th sect. of the stat. 13 Car. 2. c. 2. was not mentioned, which says, "This act shall not extend to any *attachment of privilege* at the suit of any privileged person, and upon such writs of attachment such course shall be taken for security for appearance as hath been used;" so that it seems there is no occasion

to

to insert an *ac etiam* of the particular cause of action in an attachment of privilege at the suit of an attorney who is a privileged person, in order to hold a defendant to bail.

Joseph Hole *versus* John Finch. C. B.

THE defendant was served with a copy of a *testatum capias ad respondendum* by the name of *Richard Finch*, and having entered a *common appearance* by his right name *John Finch*, the plaintiff declared against him by his right name *John Finch*; upon an affidavit made by the defendant that he was served as aforesaid, and with a notice at the bottom of the said *capias* directed thus, *viz.* *Richard Finch*, you are served with this process to the intent that you may appear, &c. and that he had not been served with any other process at the suit of the plaintiff; serjeant *Nares* moved that all proceedings might be stayed for irregularity, and had a rule to shew cause.

The defendant was served with a *capias* by the name of *Richard*, and appears by his right name *John* and the plaintiff declares against him by his right name *John*; the court will not interpose in a

summary way and set aside the proceedings of the plaintiff for irregularity

About the same time a similar motion was made in a cause of *Jackson versus Doleman* doctor in physic, C. B.

The defendant was arrested upon a *capias ad respondendum* wherein his addition was *Esquire*, and he gave a bail-bond by the name and addition of *Robert Doleman Doctor in physic*, the plaintiff declared against him by his right addition of *Doctor in physic*, whereupon it was moved that all proceedings might be stayed for irregularity; a rule to shew cause being made, the court ordered that both the above cases should come on to be debated at the same time; and now

So where a defendant has a wrong addition given him in a *capias*, puts in bail by his right addition, and the plaintiff declares against him by his right addition, the court will not interpose upon motion.

Serjeant *Burland* shewed cause for the plaintiff *Hole*.

The objection is that the *capias* is against *Richard Finch*, that the defendant has appeared by the name of *John*, and the plaintiff has declared against him by the name of *John*, and now the court is desired to stay the proceedings for irregularity; this is an unfavourable case, the merits are not at all in question; it is a motion to delay justice, and if the plaintiff's proceedings be bad in point of law, the defendant may take advantage thereof by pleading; in the present case he may crave *oyer* of the original writ, and if there be a variance between *that* and the count he may plead it, and there is no case like this to be found where-ever the court stayed proceedings as for an irregularity upon a motion, if there is, it is incumbent on the other side to shew it.

6 Mod. 28.
2 Salk. 658,
498.
4 Mod. 246.

PART. II.

5 H

Serjeant

Serjeant *Jephson* shewed cause for the plaintiff *Jackson*.

Where the *return* of the *capias ad respondendum* is wrong; where there are not 15 days between the *teste* and *return*; where the notice for the defendant to appear is wrong and not agreeable to the act of parliament, or where there is no attorney's name to the writ, the court upon motion generally sets the same aside for irregularity; but I cannot find that the court ever set aside proceedings in a cause upon motion, for a variance between the *capias*, or the writ and the count; the old way of declaring was to spread out and repeat the whole original writ in the declaration in all actions whatsoever, until the order made by this court in *Michaelmas* term 1664. *sect.* 16. whereby it is ordered, "For avoiding of long and unnecessary repetitions of the original writ in actions upon the case, and personal actions upon penal statutes, that declarations in actions of trespass upon the case, or personal actions upon any general statute, namely hue and cry, monopolies, and for suits in the Admiralty, and such like other than *debt*, repeat not the original writ but only the nature of the action, viz. *A. B. was attached to answer C. D. in a plea of trespass upon the case; or in a plea of trespass and contempt against the form of the statute.*" And when the whole original writ was so spread out on the roll together with the count thereupon, if the count varied from the writ in any thing material, it was usual for the defendant to plead in *abatement* or *demur* for the variance. In this case the defendant ought to have craved *oyer* of the original writ, and pleaded the variance if there was any.

Curia: At this day the courts of justice interpose in a summary way and in many cases set aside proceedings upon motion, where the law hath provided other remedy; as where they see that a plea is frivolous and dilatory, and that there is no ground or foundation for pleading such sham plea, they will set it aside; so they will upon motion set aside executions irregularly issued and executed, and order the money levied thereon to be restored to the party, where the only remedy formerly was by *audita querela*, but neither of the cases at bar are such as ought in justice to induce the court to interfere in a summary way, and stay or set aside the proceedings for irregularity.

Formerly, when the whole original writ was spread in the same roll with the count thereupon, if a variance appeared between the writ and count, the defendant might have taken advantage thereof, either by motion in arrest of judgment, writ of error, plea in *abatement*, or *demurrer*. *Cro. Eliz.* 829, 185, 198, 330. 2 *Lutw.* 1181.

1181. S. P. — But afterwards it was determined that if the defendant will take advantage of a *variance* between the *writ* and *count*, he must demand *oyer* of the writ and shew it to the court. 4 Mod. 246. *Ellery v. Hicks & Ux'*. 2 Salk. 701, 658. 6 Mod. 303. And a case in MS. of *Gross v. Lee*, which was replevin by writ for taking his *cattle*, the *count* was for taking a *grey horse*, there was a demurrer for the *variance*, but judgment was for the plaintiff. *Parker C. J.* cited Salk. 701. and the court held that defendant cannot take advantage of a *variance* between the *writ* and *count* without shewing *oyer* of the writ.

If a defendant will take advantage of a variance between the writ and count he must crave oyer of the writ and spread it on the record. Ante 85. in B. R.

There is no equity to authorize us to interpose in either of these cases; and if the defendants in either case can take any advantage *rigore juris*, let them take it. One reason why the court should not interpose is, that after the defendant hath appeared and is in court there is an end of the *mesne process*, and if the defendant craves *oyer*, it must be of the *original writ*, he cannot have it of the *mesne process*; and if application was to be made to the Master of the Rolls, he certainly would not refuse to order right *originals* to be made out in both these cases. The rules must be discharged, but without costs, this being a new case. *Per totam curiam*.

Rigg versus Curgenvén. C. B.

3 Add. 57

ACTION of debt for 27000*l.* brought against the defendant (upon the *stat. 2 Geo. 2.* for the more effectual preventing bribery and corruption in the election of members to serve in parliament) for corrupting and procuring 54 voters to give their votes at the last election for the borough of *Mitchell* in the county of *Cornwall*, wherein the plaintiff declares that whereas *Mitchell* is an antient borough, and, for a long time past, two burgesses thereof have been elected and sent, and still of right ought to be elected and sent to serve in parliament for the said borough; and whereas on the 12th of *March* in the 8th year of his present majesty's reign, the King's writ under his great seal issued out of his court of Chancery directed to the then sheriff of *Cornwall*, reciting that whereas by the advice of his council, &c. he had ordered a *parliament* to be holden at *Westminster* on the 10th day of *May* then next ensuing, the King by his said writ commanded the sheriff to make proclamation (so sets out the whole writ); which writ on the 14th of *March* in the same year was delivered to *Frances Kirham*, Esq; then and still sheriff of *Cornwall*, to be executed in due form of law; by virtue whereof the sheriff on the said 14th of *March* made his precept in writing, sealed with the seal of his office, directed to the *portreeve* of the borough of *Mitchell* for the election there of two burgesses; by virtue of which precept, on the 21st day of *March* in the same

In an action upon the statute for bribing a person to give his vote at an election for members of parliament, it is not necessary to prove that the person bribed had a right to vote.

year at *Mitchell* an election of two burgesses for the same borough was had, which said election was the first and next election of burgesses of the said borough to serve as burgesses of the said borough in the parliament of this kingdom after the committing of the several offences hereafter mentioned; and the said *James Rigg* further says, that at the time of committing the several offences hereafter mentioned and before, and from thenceforth until and at the said election, *James Scawen* and *John Stephenson* were candidates, that they might be elected and chosen to serve as burgesses for the said borough at the aforesaid then next parliament, that is to say, at the borough of *Mitchell* aforesaid; and the said *James Rigg* further says that the said *William Curgenven*, not regarding the statute in this case lately made and provided, nor fearing the penalty contained therein, after the 24th day of *June* 1729. and before the said election of burgesses in and for the said borough, and whilst the said *James Scawen* and *John Stephenson* so were and continued candidates as aforesaid, and before the suing out the original writ of the said *James Rigg*, to wit, on the first day of *March* in the 8th year of the reign of his present majesty, at the borough of *Mitchell* aforesaid in the said county did corrupt one *Peter Buddle*, the said *Peter* being then and there and from thenceforth until and at the time of the election aforesaid having a right to vote in the said election, to give his vote in the said election for the said *James Scawen* and *John Stephenson*, that they might be chosen burgesses to serve as burgesses for the same borough in the said then next parliament of this kingdom, by then and there giving to the said *Peter Buddle* a large sum of money, to wit the sum of five pounds and five shillings of lawful money of *Great Britain*, as a gift or reward for his the said *Peter Buddle*'s giving his vote as aforesaid for the said *James Scawen* and *John Stephenson* at and in the said election, contrary to the form of the statute in such case lately made and provided; whereby and by force of the said statute, an action hath accrued to the said *James Rigg* to demand and have of the said *William Curgenven* 500*l.* part of the said 27000*l.* And the said *James Rigg* further says, that the said *William Curgenven*, not regarding the statute in this case lately made and provided, nor fearing the penalty contained therein, after the 24th of *June* 1729. and before the said election of burgesses in and for the said borough, and whilst the said *James Scawen* and *John Stephenson* so were and continued candidates as aforesaid, and before the suing out the said original writ of the said *James Rigg*, that is to say, on the said first day of *March* in the said 8th year of his said majesty's reign, at the borough of *Mitchell* aforesaid in the said county did corrupt one *Peter Buddle*, he the said *Peter Buddle* then and there and from thenceforth until and at the time of the election aforesaid having a right to vote at the said election, to give his vote for the same *James Scawen* and *John Stephenson* in the said election, that they might be chosen

Second count.

chosen burgesſes to ſerve as burgesſes for the ſaid borough in the ſaid then next parliament of this kingdom, by then and there * agree- * Varies from the firſt count, ing to give the ſaid *Peter Buddle* a large ſum of money, to wit, the ſum of 5*l.* and 5*s.* of like lawful money as a gift or reward for his the ſaid *Peter Buddle's* giving his vote as aforeſaid for the ſaid *James Scarwen* and *John Stephenſon* at and in the ſaid election, contrary to the form of the ſtatute in ſuch caſe lately made and provided; whereby, and by force of the ſaid ſtatute, an action hath accrued to the ſaid *James Rigg* to demand and have of the ſaid *William Curgenven* other 500*l.* other part of the ſaid 27000*l.* (there are 52 other counts in the declaration exactly the ſame as the two counts above mentioned reſpecting *Peter Buddle*, differing only in the names of 26 other perſons corrupted by the defendant, among whom is one *William Hockin* in the 11th count, for which the plaintiff had a verdict): Nevertheless the ſaid *William Curgenven*, Breach. although often requested, hath not rendered to the ſaid *James Rigg* the ſaid 27000*l.* or any part thereof, but hath hitherto altogether denied and ſtill doth deny to render him the ſame, whereupon the ſaid *James Rigg* ſaith that he is injured, and hath damage to the value of 100*l.* and therefore he brings ſuit, &c. The defendant pleads *nil debet*, whereupon iſſue is joined.

This cauſe came on to be tried before Mr. Juſtice *Willes* at the laſt ſummer aſſiſes for *Cornwall*, when a verdict was given for the plaintiff on the firſt and eleventh counts, ſubject to the opinion of this court on the following caſe, viz.

That the plaintiff on the trial of this cauſe proved the writ and precept as mentioned in the declaration, and that *James Scarwen* and *John Stephenſon*, Eſqs; were candidates, as therein mentioned, and that the right of voting for representatives for the ſaid borough was in the inhabitants paying *ſcot* and *lot*, and that before the ſaid return of burgesſes, and whiſt the ſaid *James Scarwen* and *John Stephenſon* ſo were and continued candidates, and before the ſuing out the original writ of the plaintiff, to wit, the *firſt day of March* in the 8th year of his preſent majeſty the defendant did corrupt the ſaid *Peter Buddle* and *William Hockin* to give their votes in the ſaid election for the ſaid *Scarwen* and *Stephenſon* that they might be choſen to ſerve as burgesſes for the ſaid borough, by then and there giving to the ſaid *Peter Buddle* and *William Hockin* the ſum of 5*l.* 5*s.* as a gift or reward for the ſaid *Peter Buddle* and *William Hockin* giving their votes as aforeſaid: that the ſaid *Peter Buddle* and *William Hockin* afterwards voted at the ſaid election for the ſaid *James Scarwen* and *John Stephenſon*, but the defendant's counſel having objected to the aforeſaid evidence, as not ſufficient evidence of the ſaid two perſons-right to vote, a verdict was given for the plaintiff upon the two counts wherein the defendant is charged for

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having

having corrupted the said *Peter Buddle* and *William Hockin*, subject to the opinion of this court, whether the evidence of the defendant's having bribed the said two persons to vote as aforesaid, and their having actually voted accordingly without producing the *poor rates*, be evidence of their right to vote, as against the defendant.

This case was argued the 27th of *January* in this term, by serjeant *Davy* for the plaintiff, and serjeant *Glynn* for the defendant.

For the plaintiff it was insisted that it was not necessary to alledge in the declaration that *Euddle* and *Hockin* had a right to vote, for the words of the statute are, "Any person who hath or claimeth to have, or hereafter shall have or claim any right to vote, &c." So that if *A.* applies to *B.* who has no right to vote, and bribes him to vote for *C.* and *D.* and *B.* actually gives his vote for them, *A.* is equally guilty under this statute as if *B.* had had a right to vote. The case of *Comb v. Pitt. B. R.* tried at *Wells* in 1763. before Mr. Justice *Wilmot* was cited, which was a motion for a new trial, and was said to be exactly like this case; that the declaration in that case was *verbatim* (except in dates and names) the same as this; it charged that *A. B.* had a right to vote, and did vote, but it was not proved at the trial that he had a right to vote; it was proved that *A. B.* voted and was received upon the poll, and that the defendant *Pitt* gave him money to give his vote; the court of *B. R.* held clearly it was conclusive evidence against the defendant *Pitt*, and gave judgment for the plaintiff; Lord *Mansfield* said, shall the defendant be allowed to defend himself by saying that *A. B.* had no right to vote, when it is clearly proved that the defendant gave him money for his vote? certainly he shall not. *Wilmot* justice said there could be no stronger evidence than *A. B.*'s being admitted to vote. This case in *B. R.* was relied upon, as directly in point for the now plaintiff.

For the defendant it was insisted, that the averment or allegation in the declaration "that the person corrupted had a right to vote," is *material*, and *substantive*, and must be proved; that an intention to commit an offence cannot be punished, but if these persons had no right to vote the offence is not committed, therefore it was necessary to prove they had a right, by proving they were inhabitants of *Mitchell*, and paid *scot and lot* there. That suppose an action of *scandalum magnatum* was brought for speaking slander of a peer or a judge, &c. it must be proved that the plaintiff was *that great person* which the declaration alledges him to be, or he will fail in his action. That suppose it had appeared that *Buddle* and *Hockin* had no right to vote, the declaration would fail, because the averment therein would not be supported. That the poll book is not evidence

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evidence of a person's right to vote, for although he voted, it does not follow that he had a right to vote. Suppose in an action for criminal conversation it be proved that the defendant had said that he had laid with the plaintiff's wife, *that* would not be evidence to be left to a jury without proving the marriage of the plaintiff and his wife; and so it was said to be determined in a case of *Dr. Smith v. Miller*, which was an action for criminal conversation with the plaintiff's wife; the proof at the trial was, that when the defendant was caught in bed with her he begged the Doctor might not know it, and said "for God's sake let it not be known." The plaintiff could not prove his marriage, and it was held that the defendant's apprehensions that the person, with whom he was caught in bed, was the plaintiff's wife, was not sufficient to convict him, as there was no proof that he knew her to be such, of his own knowledge. From this case it was said, it follows that no belief or report that a person has a right to vote is evidence.

Curia: We are of opinion that it is not necessary in this case to alledge in the declaration or to prove that *Buddle* and *Hockin* had a right to vote; that the giving money to a man for his vote, and he standing by the presiding officer at the election, and giving his vote, which is received, and not objected to, or controverted, is conclusive evidence against the defendant, and that, as against *him* it is the most decisive and best evidence that can be; and the case cited of *Comb v. Pitt*, governs this case, and is exactly like it. As to the case mentioned of criminal conversation, to be sure a defendant's saying in jest, or in loose rambling talk, that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in *that* action; but if it were proved that the defendant had seriously or solemnly recognised that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to a jury without proving the marriage. We think that the proof that these two persons voted at the election, and their votes not then disputed or controverted, is evidence of their having a right to vote, proper to be left to a jury; although it be not *conclusive* evidence of such their right. Judgment for the plaintiff *per totam curiam*.

Easter

Easter Term

9 Geo. 3. 1769.

513 H. 776
1 April 2023

Holder on the demise of Sulyard, Esq; Lord of the manor of Haughley in Suffolk, *versus* Preston. C. B.

EJECTMENT of copyhold lands held of the manor of *Haughley*, tried at the last assises held for the county of *Suffolk*, when a verdict was given for the plaintiff, subject to the opinion of this court upon the following case, which states,

A copyholder surrenders to the use of his will, and by his will orders and directs two persons to sell, and to apply the monies arising thereby, for the purposes in the will; they may sell without being admitted, and the lord shall admit the vendee, and shall have but one fine.

That *James Andrews* clerk, being seised in fee of certain copyhold lands held of the manor of *Haughley* with its members in the county of *Suffolk*, on the first of *September 1752*. duly surrendered the same in open court to the use of his will; and afterwards by his will duly executed did order and direct, That *John Canbam*, Esq; and *Edward Coldham*, or the survivor of them, or the executor or administrators of such survivor, should (among other things) make sale of the said copyhold premises, and apply and dispose of the monies arising thereby for the intents and purposes in the said will mentioned. That the said *John Canbam* and *Edward Coldham*, by virtue of the said will and surrender to the use thereof, did by deed indented bargain and sell the said copyhold premises to *Richard Ray*, Esq; and his heirs, to hold to him the said *Richard Ray*, his heirs and assigns, of the lord of the said manor, according to the custom thereof, by the rents and services due and accustomed for the same; that at a general court baron holden for the said manor the death of the said *James Andrews* was presented, and at that and two subsequent courts proclamations were duly made for his heirs to come in and be admitted to the said premises; that at the last of the said three courts the said *Richard Ray* personally attended with the said deed of bargain and sale, and craved admittance thereon, which the lord of the said manor refused to grant, insisting that the said trustees should have come into court and been admitted to the said premises previous to their making sale thereof, and paid a fine for such their admission; that a fourth proclamation was made at a subsequent

subsequent court, and a warrant of seizure awarded, and duly executed.

That the first person admitted under such bargain and sale was in the year 1703. and that between *that* time and the year 1760. several persons have been admitted under such bargains and sales, without the trustees of such wills having been previously admitted; and that during that period no person claiming under such bargain and sale appears to have been refused.

This case was argued last term by serjeant *Leigh* for the plaintiff and serjeant *Glynn* for the defendant; and in this term serjeant *Whitaker* argued for the plaintiff, and serjeant *Forester* was prepared for the defendant, but the court without hearing him gave judgment for the defendant.

Curia: The questions for the consideration of the court are whether Mr. *Ray*, the purchaser of these copyhold lands, was intitled (under the surrender, will, bargain and sale) to be admitted to the same on payment of one fine? or whether the trustees under the will must first be admitted, and then surrender to Mr. *Ray*?

We are all of opinion that the lord of the manor ought to have admitted Mr. *Ray* to the copyhold lands in question; we had very little doubt of this upon the first argument, but as counsel were retained on both sides to take notes, and the parties desired a second argument, we permitted an *ulterius concilium*; and having now heard brother *Whitaker*, who has said all that can be said for the plaintiff, we are all very clear (without hearing brother *Forster*) that judgment must be for the defendant, and that the lord in this case is only intitled to one fine.

5 B. 40d 254

Copyholders, anciently, were little better than slaves, or the cattle upon the land; their tenure originally (most probably) was in *villinage*; by the help of reason, true religion, and science, we by degrees emerged from that state of barbarity; *villinage* became *copyhold*, but still the tenure was at the mere arbitrary will of the lord; at length copyholders got more permanent estates, like freeholds; anciently their lord might oust and turn them out when he pleased; his fines were arbitrary, but since we are become more civilized and free, the lord cannot at this day set a fine at more than two years value upon an admittance on an alienation; *admittance* formerly was of *grace*, and *favour*, now it is of right; the lord took his *fine* for the *admittance* in nature of a *relief*, it was a *boon* for having admitted the tenant, and the *admittance* is the true parent of the *fine*, for he could have no *fine* without admittance. 4 Rep. 28. a.

PART II.

5 K

If

If a copyholder surrenders to the use of his will, and devises to *A. B.* and his heirs, the will *only* doth not pass the estate, but the surrender and will together transfer the estate. The legal estate in *this* case was in Mr. *Andrews* the devisor until his death, when it descended to his heir, in whom it now continues until the admittance of Mr. *Ray* the vendee under the *order* and *direction* of the will. So in the case of an alienation the copyhold estate always rests in the surrenderor until the surrenderee be admitted tenant. 4 *Rep.* 23. *a.* *Fitch's* case.

Cro. Jac. 199.
4 *Mod.* 318.
Co. Lit. 111.
b. 271. *b.*

It is objected for the plaintiff that the trustees (who have no estate or interest given them by the will, but are only *ordered* and *directed* to sell,) ought first to have been admitted, before they could have power to sell to Mr. *Ray*. In answer to this we are of opinion that when the devisor died, the power to sell was instantly in the trustees, and that where a man by his will gives power to sell, the lands descend to his heir until that power be executed. There is a great difference between a *naked power* and a *vested interest*; upon a *naked power* given to a *wife*, she may sell to her *husband*; in the present case, a mere naked power is given by the will to the trustees to sell, and when the vendee comes in, he is *in* under the surrender and the will, as much as if he had been expressly named in the will.

See *Atkins*
95.
1 *Burro.* 206.
Co. Copyh.
50, &c,

But it is objected how can a man sell when he has nothing in the lands; in answer to this, see *Co. Lit.* 271. *b.* The commissioners (in the case of a bankrupt seized of copyhold lands) by their bargain and sale put an estate therein in the assignees, although the commissioners were never admitted, and the assignees who are bargainees or vendees take from the original owner of the estate

We think these trustees have no right to be admitted tenants either in law or equity, because they have no interest, but only a mere naked power or authority. We shall not take notice of the case in *Cro. Jac.* 199. because we think our determination wants no case to support it; as Mr. *Ray* the vendee came *in* upon the third proclamation and desired to be admitted, he ought to have been admitted upon paying a reasonable fine to the lord, who has no hardship in this case. Judgment for the defendant *per totam curiam*.

Villers

Villers *versus* Monsley. C. B.

9/13.6.1772

ACTION upon the case against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, *viz.*

Case upon a libel, for writing a letter that plaintiff stunk of brimstone, and had the itch.

“ Old Villers, so strong of brimstone you smell,
 “ As if not long since you had got out of hell,
 “ But this damnable smell I no longer can bear,
 “ Therefore I desire you would come no more here ;
 “ You old stinking, old nasty, old *itchy old toad*,
 “ If you come any more, you shall pay for your board,
 “ You’ll therefore take this as a warning from me,
 “ And never more enter the doors, while they belong to J. P.

Wilncoat, December 4, 1767.”

The defendant pleaded Not guilty; a verdict was found for the plaintiff and sixpence damages, at the last assizes for the county of *Warwick*. And now it was moved by serjeant *Burland* in arrest of judgment that this was not such a libel for which an action would lie; that the itch is a distemper, to which every family is liable; to have it, is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection; the *small pox*, or a *putrid fever*, are much worse distempers; the *itch* is not so detestable or so contagious as either of them, for it is not communicated by the air, but by contact or putting on a glove, or the cloaths of one who has the *itch*; and although it be an infectious distemper, yet it implies no offence in the person having it, and therefore no action will lie for saying or writing that a man has got the *itch*. It is not like saying or writing that a man has got the *leprosy*, or is a *leper*, for which an action upon the case will lie, because a *leper* shall be removed from the society of men by the writ *de leproso amovendo*. 1 Ro. Abr. 44. Cro. Jac. 144. Hob. 219. although it be a natural infirmity.

See 2 Burro.
 The King v.
 Bingham.

Wilmot Lord C. J. I think this is such a libel for which an action well lies; we must take it to have been proved at the trial that it was published by the defendant *maliciously*; and if any man *deliberately or maliciously* publishes any thing in writing concerning another which renders him *ridiculous*, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher; I see no difference between this and the cases of the *leprosy* and *plague*; and it is admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, although the distemper is almost driven away by cleanliness, or new
 invented

Registrum
Brevium 267.
b.

invented remedies; the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay *ad locum solitarium ad habitandum ibidem prout moris est, ne per communem conversationem suam hominibus dampnum vel periculum eveniat quovismodo*. The degree of *leprosy* is not material, if you say he has the *leprosy* it is sufficient, and the action lies; the reason of that case applies to this; I do not know whether the *itch* may not be communicated by the air without contact, it is said to be occasioned by *animalcula* in the skin, and must be cured by outward application; no body will eat, drink, or have any intercourse with a person who has the *itch* and stinks of brimstone, therefore I think this libel actionable, and that judgment must be for the plaintiff.

Clive: I am of the same opinion, that this is a very malicious and scandalous libel.

Bathurst Justice: I wish this matter was thoroughly gone into, and more solemnly determined; however I have no doubt at present but that the writing and publishing any thing which renders a man ridiculous is actionable; and whether the *itch* be occasioned by a man's fault or misfortune, it is a cruel charge, and renders him both ridiculous and miserable, by being kept out of all company; I repeat it, that I wish there were some more solemn determination that the writing and publishing any thing which tends to make a man ridiculous or infamous ought to be punished; for saying a man has the *itch* without more perhaps an action would not lie without other malevolent circumstances; I am of the same opinion that judgment must be for the plaintiff.

Gould Justice: What my brother *Bathurst* has said is very material; there is a distinction between libels and words: a libel is punishable both criminally, and by action, when speaking the words would not be punishable in either way; for speaking the words *rogue* and *rascal* of any one an action will not lie; but if those words were written and published of any one, I doubt not an action would lie; if one man should say of another that he has the *itch*, without more, an action would not lie; but if he should write those words of another, and publish them *maliciously*, as in the present case, I have no doubt at all but the action well lies: what is the reason why saying a man has the *leprosy* or *plague* is actionable; it is because the having of either cuts a man off from society; so the writing and publishing *maliciously* that a man has the *itch* and stinks of brimstone cuts him off from society. I think the publishing any thing of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff. Judgment for the plaintiff *per tot' cur.* without granting any rule to shew cause.

5 Rep. 125.

Redshaw *versus* Brook and others. C. B.

TRESPASS against the defendants (who are custom-house officers) for breaking and entering the plaintiff's house and searching every place therein for prohibited and uncustomed goods, but they found none; upon Not guilty pleaded this cause was tried before Lord C. J. *Wilmot*, when the jury gave a verdict for the plaintiff and 200*l.* damages.

Trespass against custom-house officers for entering plaintiff's house and searching for prohibited goods where they found none; the jury find 200*l.* damages against them, though they did very little or no damage. A new trial refused.

Serjeant *Davy* now moved for a new trial, alledging that the damages were excessive, for that it appeared upon the trial that the defendants had not done damage to the plaintiff to the value of 10*s.* whereupon the Lord Chief Justice reported as follows, *viz.*

It was proved for the plaintiff, that on the second of *May* the defendants came to the plaintiff's house, and desired to see every place therein, and to search for prohibited goods, which they did, and opened many bundles of goods, but found none such; then they desired to go into the cellar, but the door thereof being locked, and the plaintiff himself being from home, and having the key of the cellar door with him, his son sent for a blacksmith, and had the door opened, whereupon the defendants entered the cellar to search for cambricks and prohibited goods, but found none; plaintiff's sons then told the defendant they had done the plaintiff great wrong, and would be brought to justice; the defendants continued the search about twenty minutes and then departed; it appeared they did very little damage, and behaved well enough; they did not pretend to have been informed by any body that the plaintiff had any prohibiting goods in his house, nor was there any proof of any such information at the trial; this is the substance of the evidence given at the trial. And

Although I myself may think 200*l.* too large damages, yet how can we draw the line to fix the measure of damages in this case; I cannot say the jury have done wrong, and perhaps, if I had been one of the jury, some of them might have convinced me that 200*l.* damages are little enough; I am not dissatisfied with the verdict.

Clive Justice: As my Lord C. J. is not dissatisfied, how can we say that these damages are too large? A rule to shew cause why there should not be a new trial was refused *per totam curiam*, and serjeant *Davy* took nothing by his motion.

Trinity Term

9 Geo. 3. 1769.

Leasingby *versus* Smith, Savilian professor of geometry in the university of Oxford and doctor in physic, C. B.

Conusance of pleas refused to the university of Oxford, because it was neither claimed in due form, nor in due time.

THIS was a rule to shew cause why *claim of conusance* of this cause, prayed by the *Earl of Litchfield, Chancellor of the university of Oxford*, should not be allowed, which was made upon the motion of serjeant *Jephson* the 14th of April, the third day in the last term; upon proof by affidavits that the defendant was a matriculated member of the university, *Savilian* professor in geometry, and resident there, and upon producing to the court a letter, or warrant of attorney under the hand and seal of the *Earl of Litchfield*, appointing *A.B.* his attorney to claim *conusance* in this case for the university; also the letters patent under the great seal of *King Hen. 8.* bearing date the 1st day of April in the 14th year of his reign, whereby (amongst other things) he granted to the then chancellor, masters and scholars of the university of *Oxford* and their successors, that the said chancellor and his successors, or his deputy or commissary for the time being, should have the full conusance and examination, hearing and determination of all pleas as well of debt, trespass *contra pacem*, and other misdemeanors, as of misprisions, extortions, conspiracies, confederacies, maintainances, false allegiances, accounts, contracts and injuries whatsoever, and of all other articles which may fall into fine or redemption, or into other pecuniary punishment, and of all other personal contracts, pleas, and complaints, and other causes and matters whatsoever, by whatsoever name they are called or may be called, although they might concern the said late lord the King, his heirs or successors, (assises and pleas of freehold only excepted) within the vill of *Oxford*, &c. or elsewhere within the kingdom of *England*, after what manner soever arising, done or committed, as well at the suit of the said late King, his heirs and successors, as at the suit of the party, or in any other manner whatsoever where the scholars, or their servants or ministers, or any other persons who ought to enjoy any

any privilege of the said university of *Oxford*; which for the privileged person the said chancellor, commissary, or his *locum tenens*, or their successors for the time being, shall or will claim, &c. &c. And also upon producing to the court an exemplification of an act of parliament made in the 13th year of Queen *Elizabeth* confirming the said letters patent; and also an entry of the claim of consuance in this cause upon a roll of last *Easter* term, wherein the charter and the act of parliament are shortly *not fully* stated, and it is set forth that no scholar shall be sued, arrested or impleaded any where out of the university, for whom the chancellor shall claim this privilege; then recites that this action was commenced, and the defendant served with a *capias* as hereafter is mentioned, (the copy of which writ is annexed to the said roll), then sets forth that the defendant is a matriculated person, *Savilian* professor, and resident in the university, and concludes with praying that this court will remit the consuance of this cause to the chancellor of the university, without setting forth the declaration which had been before delivered in the cause.

June the 3d in this term the plaintiff, on shewing cause, produced affidavits that he is a builder, and that the defendant was indebted to him in the sum of 229*l.* 11*s.* 6*d.* $\frac{1}{4}$ for work and labour and materials found, in building and repairing the house of the defendant in *Oxford*, who has paid the plaintiff 91*l.* in part thereof, but has refused to pay the remainder; that the work has been fairly measured and valued, and there rests due to the plaintiff 138*l.* and upwards; that in order to recover this debt, the plaintiff

On the 21st of *January* 1769. sued out a common *capias ad respondendum*, against the defendant to answer the plaintiff *de placito quare clausum fregit* at *Oxford*, tested the 28th of *November* 1768. the last day of last *Michaelmas* term, and returnable on the morrow of the *Purification of the blessed Mary* the 3d of *February* 1769.

That on the 24th of *January* 1769. a copy of the *capias* was served upon the defendant, who entered his appearance with the filacer of *Oxford* on the 6th of *Feb.* 1769.

That on the 3d of *April*, in the vacation after *Hilary* term last, the plaintiff's attorney delivered to the defendant's attorney a declaration intituled of that term in an action upon the case upon *assumpsit*, for work done and materials found as above.

On the 12th of *April* 1769. the first day of *Easter* term, a rule to plead was given, and that

On

On the 14th of April, the third day of the same term, and *not before*, application was made to this court by the attorney of the chancellor of the university claiming this consuance, and praying the same might be allowed, when the rule to shew cause before mentioned was made on the motion of serjeant *Jephson* as above, and on the 3d of June in the present term this matter was debated by *Glynn* and *Jephson* serjeants, on behalf of the university, and by *Nares* serjeant for the plaintiff; and after time taken to consider whether the claim of consuance should be allowed, the court on the 14th of June the last day of this term gave judgment against allowing thereof to the effect following,

Judgment of
the court.

Wilnot Lord Chief Justice, (after stating all the facts exactly as above,) said to this effect:

The question is, whether this claim has been made in *due form*, and in *due time*; and we are all of opinion that it is defective in both.

The courts of *Westminster-Hall* have in all times been anxious to restrain and curb inferior jurisdictions, and to bring the subject to the common law courts *here*, for the obtaining of justice; I can easily discern very proper motives in the courts for such their conduct; there had been great power given from the crown to great men, which occasioned much oppression, and made people look up to the King, and desirous to have justice in his courts, which is more impartially administered there, than in inferior jurisdictions; this is the reason that induced the superior courts to take defendants out of inferior courts, and to lay down very strict and severe rules to keep the plaintiff to the superior jurisdiction, which he had elected and chosen, although the inferior jurisdiction proceeded in the same manner according to the rules and maxims of the common law; *a fortiori* to be more strict to see that the claim be made in *due form and time*, when it is to fetch the party, and consuance of the cause to an inferior jurisdiction that proceeds by a different law and mode of trial.

Hard. 509.

This grant of consuance of pleas to the university would have been void without an act of parliament, for the crown cannot grant consuance of pleas to proceed by any other manner than by the rules of the common law, and therefore the *stat.* of 13 *Eliz.* was made to confirm this charter to the university.

Although I regard the *civil law*, yet I hold it as *nothing* in comparison to the law of the land and a trial by a jury, therefore am inclined to keep a tight hand upon this claim, according to the rules laid down by our predecessors.

None

None whosoever have greater regard for the universities than we *all* have; I may say we have filial piety towards them, they excel in all science whatever, and shine with brighter lustre than either the *Roman, Grecian, Egyptian* or *Alexandrian* schools; they are stars of the first magnitude, and although I see some specks in them, yet I see more in others; and if there could be any partiality in this matter we should *all* have been with them, but we are bound to determine by the strict rules laid down by our predecessors.

As to this claim, at first reading thereof it seemed to me to be *imperfect*, and not entred in *due manner and form*, it is drawn after the entry of the claim, in the case of *Hayes v. Long C. B. Trinity* Ante 310. 6 Geo. 3. and if the claim in that case had been allowed upon debate, I should have been weighed down with the authority; but the only point in question there was, whether the defendant *Long* was *resident* in the university; and whether the claim was made in due manner and form, or in due time, was not at all debated by the counsel or the court; *Long* was not resident, and *that* claim was disallowed.

The entry of the claim on the roll in the case of *Kendrick v. Kynaston* in *Hilary* 4 Geo. 3. B. R. was exactly like *that* in *Hayes v. Long*, (which seems to be drawn from it) I was in that court when a rule to shew cause was made why the claim of consuance should not be allowed; but nothing further was done, nor was the rule ever made absolute; so that whether the claim in the case of *Kendrick v. Kynaston* was duly made and entred or not, was never determined.

I shall now consider this claim, how it stands, and how and when it ought to have been made.

The claim of consuance in this case, is an intervention of a third person demanding judicature in the cause, against the plaintiff who has chosen to commence his action *here*, and it is telling this court they have no right to try the cause; and if the university have a right to such judicature and consuance, they have a right to tell this court so; but yet the court and the crown are interested, because the claim is made against the general jurisdiction of the King's superior court, and against the administration of justice therein, the finest garland in the crown; therefore the court, as judges between the crown and the university, must look into the claim nicely, and see whether it be made in *due form* and *time* according to the strict rules laid down by our predecessors.

This claim is a demand of something *quod sibi debetur*, the consequence whereof is, that it must be perfectly entred upon record,
 PART II. 5 M must

must state every thing that is to take away the general jurisdiction of this court; it may be demurred to, or the facts therein alledged may be controverted by pleading; the whole ought to be set forth with all the proceedings in the cause that have been *here* with great precision; in this case the claim was made after the declaration was delivered.

The period and situation of the cause at the time when the claim was made is very material; a declaration had been delivered on the 3^d of April, a rule to plead given the 12th of April, and the claim was made the 14th of April, so that it was necessary to set forth the declaration in the entry of the record of the claim, which is not done; there ought to be no diminution of any part of the proceedings in the cause, but the whole progress thereof till the instant of the making the claim ought to have been entred on the roll, so that the proceedings and declaration in this cause ought to have been entred on the roll; and then upon the same roll the entry goes on thus, *viz.* And the said defendant by *A. B.* his attorney comes (but the defendant says no more, nor makes any defence) and hereupon comes *George Henry Earl of Litchfield*, chancellor of the fair university of *Oxford* by *C. D.* his attorney to demand, claim, prosecute and defend his liberties and privileges thereof, that is to say, to have the conuſance of the plea aforesaid (and so the whole claim is entred in due form to the end thereof, which concludes thus), and the aforesaid chancellor demands his liberties and privileges aforesaid, according the form and effect of the letters patent aforesaid, and the confirmation aforesaid, in this plea between the parties aforesaid here in the court of the Lord the King now depending to be allowed to him, * *as heretofore hath been allowed.*

*These words seem to be unnecessary in this case. because this is a franchise given by an act of parliament.

In the case of *Wells and Traberne* the claim was disallowed, so that the roll wherein the entry was made was taken away and never filed; but I have been favoured with a sight of a copy of that entry by Mr. *Wilmot*, who was concerned in that cause wherein the proceedings in the cause are stated in the manner and form as I have said; in *Ryley and Appleby v. Storey*, *Easter 9 Ann. Roll.* 330. the proceedings are there stated as in *Wells and Traberne*. In *Chapman and Wisb*, *Trinity 3 & 4 Geo. 2. Roll.* 356. *C. B.* the entry is the like as in *Wells and Traberne*; so also in ——— *v. Farwell*, *Mich, 1 Geo. 1. Roll* 613. all these cases shew what is to be entred on the roll in making a claim of conuſance.

The proceedings in the cause so far as they have gone ought to be stated in the same roll with the claim, because the court, if the claim be allowed, does not so absolutely dismiss the cause that it can never be brought back again; but it is plain from many of the old entries that the parties have a day given them in the court of the party

party claiming conuſance, and if *that* inferior court ſhall not do them *full and ſpeedy* juſtice, they ſhall return again to the King's court for juſtice; after the entry of the allowance of the claim, the further entry upon the ſame roll runs thus, *viz.* " Et ſuper hoc " idem attornatus eorundem abbatis & conventus hic in curia præ- " fixit diem partibus prædictis coram ſeneſchallo ipſorum abbatis & " conventus apud T. infra hundredum prædictum die lunæ proximo " poſt feſtum Pentecoſtes proximum futurum: *Et dictum eſt eidem* " attornato prædictorum abbatis & conventus quod patribus prædictis " plena & celeris juſtitia inde exhibeatur, alioquin redeant, &c. Poſch. 17 Hen. 7. Rot. 33. Reſt. Ent. 129. ſo it appears, that for good cauſe ſhewn to this court, the cauſe may be brought back again, and a re-ſummons may be awarded, and the parties may go on *tere* again from the period or ſituation the cauſe was *in* at the time of the allowance of the claim; but in ſuch caſe if the ſtate of the proceedings at the time of the allowing the claim was not to be entred upon record, the plaintiff would be obliged to commence another action, and to declare again for the ſame cauſe, which would occaſion great delay and expence; but in theſe claims there muſt be no delay whatever; this ſhews the neceſſity of ſtating the declaration in the entry on the roll.

It was objected at the bar on behalf of the univerſity, that the declaration being of *Hilary term*, and delivered in the vacation a few days before *Eaſter term*, they could not take notice of the declaration, becauſe in that caſe the claim would have appeared to have been made after an *imparlance*, which was never allowed, for an *imparlance* annihilates a claim, and therefore they were obliged to graft the claim upon the writ of *capias quare clauſum fregit*, and that they came to the court to make it in due time before the rule for pleading was out, *viz.* on the 3d day in the term.

But in answer to this, we think, that under the preſent circumſtances of the cauſe, notwithstanding this kind of *imparlance*, the claim might have been entred upon a roll of *Hilary term*, and an allowance thereof prayed upon the firſt day of *Eaſter term*, for the delivery of a declaration, (intituled of *Hilary term*,) in the vacation after *Hilary term*, is a mere *fiction*, and the right way would have been to have ſet one *fiction* upon another, for the ſake of juſtice, and to have feigned that the claim was made in *Hilary term* as the plaintiff had feigned that the declaration was delivered in *Hilary term*, when in truth it was delivered after *that* term in time of vacation. *Fiction* in the law is a great magician, who never makes uſe of his magic but for the ſake of juſtice, for *in fictione juris ſemper eſt æquitas*; ſo that we think the declaration and claim might have been entred on a roll of *Hilary term*.

But

But suppose the claim could not be entred as of *Hilary term*, and that after a *special imparlance* it might be made and entred of *Easter term* following; in that case, it is as clear as the sun, that you must have come the very *first day* of the term to make the claim; and there is good reason for this, because you come to stop a plaintiff who is proceeding to obtain justice in a superior court at great expence.

It was said for the university, that as the first *four days* in the term by the rules of the court are allowed to the defendant for time to plead, that the claim being made on the *third day* of the term, was in due time; in answer to this we say the time to plead after an *imparlance* is strictly on the *first day* of the next term, being the *dies datus*, and that the four days allowed in that case for pleading are *ex gratia*, and by the practice of the court as to time for pleading; but this rule does not at all apply to the time for claiming conusance.

In this entry of the claim it is difficult to lay one's finger on any part of it without pointing out some objection thereto, the charter and the statute (being a private act of parliament) ought to have been fully set forth; the court is not bound to look into every private charter and act of parliament, and here they are neither of them fully set out upon this record. The case of *Castle v. Litchfield*, *Hard. 505.* seems to be almost the first claim of conusance allowed to the university of *Oxford*; diligent search has been made for the record thereof, but we are informed it cannot be found.

The conusance of pleas is granted by *act of parliament* to the university of *Oxford*, and therefore it does not seem to be necessary to shew that this charter has ever, at any time before, been allowed by the King's writ, or by any of his superior courts.

The person who drew this entry of the claim has taken the cause up at the return of the writ, as if it had stood at that period at the time when the claim was made, and when the court was moved to allow it, *viz.* the 14th of *April*, a declaration as of *Hilary term* having been delivered before on the 3d of *April*; perhaps he saw the objection upon the imparlance, and remembered the case of *Booth v. Graham B.R.*——2 *Geo. 2. Bernard 65.* where *Page J.* observing that the claim was not entred on record, the counsel for the university moved that it might be entred *nunc pro tunc*, which was refused by the court, and the claim was disallowed, because of *laches*.

But in the present case it is said there is no *laches*, for that the declaration was not delivered until after *Hilary term*, and that the university

university entred and made the claim in due time; but we are of opinion they might have entred the claim as of *Hilary* term, and were obliged to come the very first day of *Easter* term, and move the court to have it allowed; the 20 *Hen.* 4. 20. a. in a writ of *Maintenance* returnable *quinden' Martini*, the mayor and burgeses of *Bristol* claimed conufance; and it was held by all the justices that they ought to have come upon the *first day*, and that their claim should then have been entred, and because they had not so done the claim was not allowed. 11 *A.* 4. 41. b. S. P. 6 *H.* 7. 9. b. 10. S. P. 9 *H.* 7. 10. b. 12. a. S. P. 3 *H.* 6. 30. b. S. P. *Bro. Conufance*, pl. 19. *Bro. Privilege*, pl. 7. S. P. and many other cafes in the books shew that conufance of pleas must be demanded *the first day* the party hath in court, even upon the return day of the writ, if the cause of action appears therein; if it doth not, then upon the first day given upon the declaration; in the present case it appears by affidavits that the defendant had notice of the cause of action before the return of the *capias ad respondendum*, so that the chancellor ought to have come and made the claim upon the return of the writ. Upon the whole we are all of opinion that here has been delay, and that the conufance hath neither been claimed in *due form*, nor in *due time*; and therefore the same must be disallowed.

Garrard widow, administratrix, &c. *versus* Early. C. B.

2 C. B. R. 694

DEBT upon a bond; after the rule to plead was out, serjeant *Burland* moved that the defendant might have leave to plead two pleas; 1st, Performance of the condition of the bond; 2dly, That no such letters of administration as are set forth in the declaration were ever granted to the plaintiff.

Upon shewing cause, it was objected by serjeant *Nares* for the plaintiff, that the defendant cannot plead the second plea without craving *oyer* of the letters of administration, and setting the same out in that plea; and he not having craved *oyer* thereof in time, is now too late to demand it, because the rule to plead is out, and of that opinion was the court; and said, where there is any *variance* between the letters of administration set forth in the declaration, and the letters, &c. actually granted under the seal of the spiritual court, if the defendant will take advantage thereof he must crave *oyer* thereof before the rule to plead is out, must set the same out on record and demur for the variance, but that now he was too late. The rule to shew cause was discharged *per curiam*, *absente Clive J.*

Between John Weller and Elizabeth his wife, John Mercer and Sufannah his wife, Thomas Fry and Elizabeth his wife, Benjamin Fry and Sarah his wife, Ann Cripps widow, William Okill the younger and Ann his wife, Plaintiffs; and Dorcas Baker spinster, Defendant. C. B.

16th 11th 713

13th ad. 415

13th ad. 514. 1. ad. 8th 65

Joinder in action.

The dippers at Tunbridge Wells all join, and with their husbands, in an action against the defendant for exercising the business of a dipper not being duly appointed and approved according to a private statute.

Kent, ss. **T**HIS is action of trespass upon the case, wherein the plaintiffs declare, that whereas at the time of the several grievances hereinafter firstly, secondly and thirdly mentioned, and also at the time of the making of the agreement and the act of parliament hereinafter mentioned, and for a long time before, there were and still are certain springs or wells of medicinal water called *Tunbridge Wells* within the manor of *Rusthall* in the said county of *Kent*, to which said springs or wells divers persons have during all the time aforesaid resorted, and still do resort, at proper seasons of the year to drink the water thereof for the benefit of their health; and whereas before and at the time of the agreement hereinafter mentioned certain persons called *dippers* used to attend at the said springs or wells, and deliver the water thereof to such persons as resorted thereto to drink the waters thereof, and had and received from such persons so resorting divers sums of money for such their attendance and employment as such *dippers*; and whereas before and until the time of making the agreement hereinafter mentioned there subsisted between *Maurice Conyers*, Esq; then lord of the said manor, and the several freehold tenants of the said manor hereinafter mentioned divers disputes and controversies touching and concerning the said springs or wells; and whereas before the several grievances hereinafter firstly, secondly and thirdly mentioned, and also before the making of the act of parliament hereinafter mentioned, (to wit) on the 21st day of November in the year of our Lord 1739. at *Speidburst* in the said county of *Kent*, the said *Maurice Conyers* then being lord of the said manor, and the right honourable *William* lord *Abergavenny*, *Sydney Stafford Smythe*, Esq; &c. &c. &c. then being freehold tenants who then held lands and tenements of the said manor, by certain articles of agreement then and there made between the said *Maurice Conyers* of the one part, and the said freehold tenants of the other part, and sealed with their respective seals, the said *Maurice Conyers* and the said freehold tenants did determine and finally adjust the said disputes and matters in difference between them, and amongst others things in the said articles contained, the said *Maurice Conyers*, and the said freehold tenants did in and by the said articles

ticles agree, *That no person should be permitted to attend and follow the employment of a dipper of the said medicinal waters but such as should be chosen by the homage at the courts baron to be held for the said manor, and APPROVED by the lord of the said manor, in which choice and APPROBATION the wives, widows and daughters of freehold tenants of the said manor should be preferred, and should not exceed the number of twelve, as by the said articles, amongst other things, more fully appears; and whereas afterwards and before the time of the grievances hereinafter firstly, secondly, and thirdly mentioned, by a certain act made in the parliament of our late sovereign lord King George the second, at a sessions thereof holden in the 13th year of his reign at Westminster in the county of Middlesex, intituled, An act for confirming and establishing certain articles of agreement made between Maurice Conyers, Esq; lord of the manor of Rustall in the county of Kent, and the right honourable William lord Abergavenny, and other freehold tenants of the said manor relating to certain buildings and inclosures made and erected in and upon part of the wastes of the said manor, and for making the said agreement more effectual for the purposes thereby intended, it was and is amongst other things enacted, that the said articles of agreement so made and entred into by and between the said Maurice Conyers and the said freehold tenants of the said manor, and in the said act before set forth and recited, and every article, clause, covenant and agreement therein inserted and contained should be, and were by the said act ratified, established and confirmed, according to the tenor, purport and true meaning of the same, as by the said act of parliament more fully appears; and whereas before the time of the several grievances hereinafter firstly, secondly and thirdly mentioned, (to wit) at a court baron of Sir George Kelly, Knt. then lord of the said manor of Rustall, held at Speldhurst aforesaid in and for the said manor, on the 26th day of May in the year of our lord 1768. before Thomas Scoones, Gent. then steward of the courts of the said manor, the said Elizabeth Weller, Susannah Mercer, Elizabeth Fry, Sarah Fry, Ann Cripps, and Ann Okill, were duly chosen by the homage of the said court at the said court to be such dippers at the said wells as aforesaid; and afterwards, to wit, on the same day and year aforesaid at Speldhurst aforesaid were approved of by the said Sir George Kelly, then being lord of the said manor as aforesaid, and then and there took upon themselves the said employment of dippers at the said wells, and by reason thereof, and of the said agreement and the said act, the said E.W. S.M. E.F. S.F. A.C. and A.O. became and at the time of the several grievances hereinafter firstly, secondly and thirdly mentioned were, and from thenceforth hitherto have been and still are dippers at the said wells; yet the said Dorcas Baker well knowing the premises, but contriving and fraudulently intending to injure the said plaintiffs whilst the said E.W. S.M. E.F. S.F. A.C. and A.O. were such dippers as aforesaid, (to wit) on the first day*

*confirmed
by act of Parl*

of June in the year of our Lord 1768. and on divers other days and times between that day and the day of suing out the original writ of the said plaintiffs, *did use and exercise the employment of a dipper*, at the said wells, and *did take and receive divers sums of money for exercising such employment* from divers persons, who during that time resorted to the said wells to drink the waters thereof, the said Dorcas Baker not being a dipper duly chosen by the homage at any court baron of the said manor, and approved of by the lord of the said manor, nor having any right to exercise such employment as afore said, and by reason thereof the said * plaintiffs lost and were deprived of divers large sums of money, which otherwise they would have received from the said persons so resorting to the said wells as afore said; and the said † E. W. S. M. E. F. S. F. A. C. and A. O. were greatly injured in their employment of such dippers as afore said, (to wit) at Speldburst afore said; and also whereas whilst the said E. W. S. M. E. F. S. F. A. C. and A. O. were such dippers so chosen and approved of as afore said, (to wit) on the first of June in the year of our Lord 1768. and on divers other days and times between that day and the day of suing out the original writ of the said plaintiffs, the said Dorcas Baker well knowing the premisses, and contriving and injuriously intending as afore said, did use and exercise the employment of a dipper at the said wells, the said Dorcas Baker not being a dipper duly chosen by the homage at any court baron of the said manor, and approved of by the lord of the said manor, nor having any right to exercise such employment of such dipper as afore said, by reason thereof the said plaintiffs lost and were deprived of divers large sums of money which otherwise they would have received from divers persons who during that time resorted to the said wells as afore said, and the said E. W. S. M. E. F. S. F. A. C. and A. O. were greatly injured in their said employment of dippers as afore said, (to wit) at Speldburst afore said; and also whereas whilst the said E. W. S. M. E. F. S. F. A. C. and A. O. were such dippers as afore said (to wit) on the first day of June in the year of our Lord 1768. and on divers other days and times between that day and the day of suing out the original writ of the said plaintiffs, the said Dorcas Baker well knowing the premisses, and contriving and injuriously intending as afore said, did use and exercise the employment of a dipper at the said wells, the said Dorcas Baker not being a dipper duly chosen by the homage at any court baron of the said manor and approved of by the lord of the said manor, nor having any right to exercise such employment of such dipper as afore said, and by reason thereof the said ‡ E. W. S. M. E. F. S. F. A. C. and A. O. were greatly injured in their said employment of dippers as afore said, (to wit) at Speldburst afore said; and also whereas at the time of the several grievances hereinafter mentioned there were and for divers (to wit) fifty years now last past, there have been and still are certain medicinal

* The husbands and the dippers.

† Dippers only.

Second count.

Third count.

‡ Nota; this count does not say the plaintiffs the husbands were injured.
Fourth count.

cinal wells or springs of water called *Tunbridge Wells* at *Speldhurst* within the manor of *Rusthall* in the said county of *Kent*; and whereas during all the time aforesaid there have been and ought to have been and still are and ought to be certain women called *dippers*, not exceeding 12 in number, *chosen* and to be *chosen* by the *homage* at the courts baron of the said manor, and *approved* and to be *approved* by the lord of the said manor for the time being to attend at the said wells, and deliver the water thereof to such persons as during all the time aforesaid have resorted or do or shall resort to the said wells to drink the waters thereof, and during all the time aforesaid the said women so *chosen* and *approved* as aforesaid have received from such persons so resorting as aforesaid divers sums of money for such their *attendance and employment* as such *dippers*, to the comfortable support of themselves and their families; and whereas before the time of the several grievances hereinafter mentioned (to wit) at a court baron of Sir *George Kelly* Knt. then lord of the said manor of *Rusthall*, held at *Speldhurst* aforesaid in and for the said manor on the 26th day of *May* in the year of our Lord 1768. before *Thomas Scoones*, Gent. then steward of the courts of the said manor, the said *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were duly *chosen* by the *homage* of the said court at the said court to be such *dippers* at the said wells as aforesaid, and afterwards (to wit) on the same day and year aforesaid at *Speldhurst* aforesaid were *approved* by the said Sir *George Kelly*, then being lord of the said manor as aforesaid, and then and there took upon themselves the said *employment* of *dippers* at the said wells, and by reason thereof the said *E. W. S. M. E. F. S. F. A. C.* and *A. O.* became and at the time of the several grievances hereinafter mentioned were and from thenceforth hitherto have been and still are *dippers* at the said wells; yet the said *Dorcas Baker* well knowing the premises, but contriving and wrongfully intending to injure the said * *plaintiffs* whilst the said † *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were such *dippers* as aforesaid (to wit) on the first day of *June* in the year of our Lord 1768. and on divers other days and times between that day and the day of suing out of the original writ of the said *plaintiffs* did use and exercise the *employment* of a *dipper* at the said wells, and did take and receive divers sums of money for exercising such *employment* from divers persons who during that time resorted to the said wells to drink the waters thereof, the said *Dorcas Baker* not being a *dipper* duly *chosen* by the *homage* at any court baron of the said manor, and *approved* of by the lord of the said manor, nor having any right to exercise such *employment* as aforesaid, and by reason thereof the said † *plaintiffs* lost and were deprived of divers † *plaintiffs* large sums of money, which otherwise they would have received from the said persons so resorting to the said wells as aforesaid, and the said ‡ *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were greatly ‡ *The dip-* injured in their said *employment* of such *dippers* as last aforesaid (to wit) only.

PART II.

5 O

(to wit)

- Fifth count. wit) at *Speldhurst* aforesaid. And also whereas whilst the said *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were such *dippers* as aforesaid, (to wit) on the *first day of June* in the year of our Lord 1768. and on divers other days and times between that day and the day of suing out the original writ of the said *plaintiffs*, the said *Dorcas Baker* well knowing the premises, and contriving and injuriously intending as aforesaid, did use and exercise the *employment* of a *dipper* at the said wells, she the said *Dorcas Baker* not being a *dipper* duly *chosen* by the *homage* at any court baron of the said manor and *approved* of by the lord of the said manor, nor having any right to exercise such *employment* of such *dipper* as aforesaid, and by reason thereof the said *plaintiffs* lost and were deprived of divers large sums of money, which otherwise they would have received from divers persons who during that time resorted to the said wells as aforesaid, and the said *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were greatly injured in their said *employment* of *dippers* as aforesaid
- Sixth count. (to wit) at *Speldhurst* aforesaid; and also whereas whilst the said *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were such *dippers* as aforesaid, (to wit) on the *first day of June* in the year of our Lord 1768. and on divers other days and times between that day and the day of suing out the original writ of the said *plaintiffs*, the said *Dorcas Baker* well knowing the premises, and contriving and injuriously intending as aforesaid, did use and exercise the *employment* of a *dipper* at the said wells, she the said *Dorcas Baker* not being a *dipper* duly *chosen* by the *homage* at any court baron of the said manor and *approved* of by the lord of the said manor, nor having any right to exercise such *employment* of such *dipper* as aforesaid, and by reason thereof the said *E. W. S. M. E. F. S. F. A. C.* and *A. O.* were greatly injured in their said *employment* of *dippers* as aforesaid, to wit, at *Speldhurst* aforesaid, whereupon the said *plaintiffs* say they are injured, and have sustained damage to the value of 100*l.* and thereof they bring suit, &c.

The defendant has pleaded the general issue, that she is not guilty of the premises above laid to her charge, and thereupon issue is joined, which is entred of *Hilary term* last.

This cause was tried at *Maidstone* the 6th day of *March* 1769. before Mr. Justice *Clive*, when a verdict was found for the *plaintiffs* upon the second, third, fifth and sixth counts in the declaration and five shilling damages, subject to the opinion of the court upon the following case, which states

The case
stated for the
opinion of the
court.

That the *plaintiffs* gave in evidence a private *act of parliament* passed in the 13th year of *King Geo. the 2d.* confirming certain articles of agreement inserted in the said *act* in which are contained the two following clauses, (*viz.*)

Fifthly;

“ Fifthly ; It is also further agreed between the said parties, that
 “ the said *Maurice Conyers* and his heirs and assigns, and the several
 “ freehold tenants parties hereto, and their respective heirs and as-
 “ signs, shall and will from time to time, and at all times for ever
 “ hereafter, permit and suffer the said medicinal springs or wells of
 “ water called *Tunbridge Wells*, the place or shed near the said
 “ springs called *Dippers-ball*, and the walks called *Tunbridge Wells*
 “ *walks*, and all ways, passages and open pieces of ground, part of
 “ the said premisses, or leading thereto, which are particularly set
 “ forth and distinguished in the plan of the premisses hereto an-
 “ nexed, to remain always open and free for the publick use and
 “ benefit of the nobility and gentry and other persons resorting to,
 “ or frequenting *Tunbridge Wells*, in the manner the same now are,
 “ or lately have been used, and that the said *Maurice Conyers*, his
 “ heirs and assigns, shall and will from time to time join and con-
 “ cur in doing all such acts and things as shall be necessary for the
 “ preparing and keeping the same open and free, according to the
 “ true intent and meaning of this agreement.

“ Thirteenthly ; Also it is hereby further agreed by and between
 “ the parties hereto, that no person shall be permitted to attend
 “ and follow the employment of a *dipper* of the said medicinal
 “ waters but such as shall be *chosen* by the *homage* at the *court baron*
 “ to be held for the said manor and *approved* by the *lord of the*
 “ *manor*; in which choice and approbation the *wives, widows, and*
 “ *daughters of freehold tenants of the said manor shall be preferred,*
 “ and shall not exceed the number of twelve.”

It did not appear in evidence that the homage and lord had ever
 acted under the said act of parliament, or that there had ever been
 any *dippers chosen* by the *homage*, and *approved* by the *lord* from the
 time the said act passed until the 26th of May 1763. when, at a
court baron then holden, the *homage chose* and the *lord approved,*
&c. prout the following entry upon the rolls of the said court, (*viz.*)

“ At a court baron of Sir *George Kelly*, Knt. lord of the manor
 “ of *Rustball*, held at *Speldhurst* in and for the said manor on the
 “ 26th day of May in the year of our Lord 1768. before *Thomas*
 “ *Scoones*, Gent. steward of the court of the said manor,”

“ Also the homage aforesaid do choose *Elizabeth Weller* the wife
 “ of *John Weller*, *Ann Crips* widow, *Sarah Fry* the wife of *Ben-*
 “ *jamin Fry*, *Susannah Mercer* the wife of *John Mercer*, *Elizabeth,*
 “ *Fry* the wife of *Thomas Fry*, *Ann Okill* the wife of *William Okill*,
 “ *Mary* the wife of *William Friend*, and *Dorcas Baker* spinster, to
 “ attend and follow the employment of *dippers* of the medicinal
 “ waters

“ waters within this manor, commonly called *Tunbridge Wells*, subject nevertheless to the *approbation* of the lord of the said manor.

“ *The lord's approbation*: At this court Sir George Kelly, Knt. lord of this manor, *approves* of all the persons so *chosen* by the *homage* for *dippers* as aforesaid, *Dorcas Baker* only excepted.

It did not appear in evidence that any *notice* was given previous to the holding of the said court, of any *intention* to appoint *dippers* there.

It appeared in evidence that *Dorcas Baker* the defendant was the daughter of a freehold tenant of the manor, and also a freehold tenant in her own right, but no evidence was given by the plaintiffs that they or either of them were, or was respectively the wife, widow or daughter of a freehold tenant.

It appeared that the defendant *Dorcas Baker* had acted as a *dipper* during the last summer, but there was no proof of her having received any gratuity, other than general evidence, that the employment of a *dipper* is attended with profits which arise from the voluntary contributions of the company resorting to *Tunbridge Wells*.

This case was twice argued at the bar; the first time in *Easter term* last by serjeant *Jephson* for the plaintiffs and serjeant *Nares* for the defendant; and the second time in this term by serjeant *Leigh* for the plaintiffs and serjeant *Forster* for the defendant; after a few days time taken to consider, judgment was given for the plaintiffs *per totam curiam*, to the following effect.

Curia: There are two general questions in this case; 1st, Whether the defendant *Dorcas Baker* the daughter of a freehold tenant of the manor, and *chosen* by the *homage* to be a *dipper* at the *Wells*, but not *approved* of by the lord of the manor, can justly follow or exercise the *employment* of a *dipper*?

2^{dly}, Supposing she cannot, whether the plaintiff's have a right to recover in this action.

As to the first question, we are all of opinion that the defendant cannot justly follow or exercise the employment of a *dipper*; the words of the agreement between the lord and his freehold tenants are, “ That no person shall be permitted to attend and follow the employment of a *dipper* of the medicinal waters, but such as shall be *chosen* by the *homage* at the court baron to be held for the manor and *approved* by the lord, &c. which are now the words of an act of parliament, and as clear and plain as words can possibly be;

be; none shall be *dippers* but such persons as shall be *chosen* by the *homage* and also *approved* of by the lord; *Dorcas Baker*, (it appears) was not *approved* of, but on the contrary was excepted against by the lord; therefore by the clear words of the statute, she shall not be permitted to attend and follow the employment of a *dipper*.

The intention of this statute is also plain; before the making thereof, there was a great contest between the lord and his tenants touching their right of common, these wells, and other matters; the lord was much benefited by the great resort of the nobility and gentry to drink the waters, and the tenants thought themselves injured in their right of common, &c. at length the articles of agreement were made and executed, and being found to be for the mutual advantage of the lord and tenants, were confirmed by parliament and made firm and permanent; the benefit of these waters being thereby given freely to the public, it was necessary to establish a rule, how, and in what manner, they should be dealt out to the public; the tenants having lost part of their common, thought they ought in consideration thereof to have some benefit, therefore to prevent strife, confusion and a kind of civil war amongst the tenants, which must necessarily follow if every body who pleased was suffered to exercise the employment of a *dipper*, it was agreed that the homage should *choose* and the lord should *approve*, not more than twelve persons to be *dippers*; so that, by this law, all dissolute idle persons are prevented, and no person shall come to be a *dipper* at the wells, but whom the lord pleases, who is the owner of the soil where they are; *cujus est dare ejus est disponere*; it was a very right measure, that every person should be (as it were) stamped with the seal of both the lord and the homage, before she should be permitted to exercise this employment of *dipper*; so that we have no doubt but the lord must *approve*.

Another *matter* was mentioned at the bar as to this first question, and *that* was, whether these words in the articles and the statute, (*viz.*) “*In which choice and approbation the wives, widows and daughters of freehold tenants of the manor shall be preferred,*” are *mandatory* or *directory*; but this not being an action against the lord for refusing to *approve* of *Dorcas Baker* after she was *chosen* by the homage, we need not determine this matter. There are many cases where the words of a statute seem to be *mandatory*, yet have been held to be only *directory*; and so *è contra*, where words which seem to be *directory*, have been held to be *mandatory*, the subject matter of a statute must explain the true meaning thereof. The words in the present case seem to be *mandatory*, and yet, on the other hand, if they be *absolutely compulsory*, it would take away the *choice* and *approbation* of any other persons but the *wives, widows and daughters of freehold tenants*; we give no opinion as to this

matter, but think that if the homage do choose the *wife, widow or daughter of a freehold tenant* to be a *dipper*, the lord ought to *approve* of such person, unless he has some good exception against her; if *Dorcas Baker* could have an action against the lord for not *approving* of her after the homage had *chosen* her, she could only recover *damages*, and not a *specific relief*; but let her right of action against the lord be what it will, it does not apply to our case; at present we are of opinion she cannot justly follow or exercise the employment of a *dipper*, which brings us to the

Second question, which is, whether the plaintiffs have a right to *recover* in this action?

Several objections were made by the counsel for the defendant; 1st, It was said, that there must be both an *injury* and a damage done to, and sustained by the plaintiffs, to support an action upon the case; in answer to this, we say here is both an *injury* and a *damage*; an *injury*, by the defendant's disturbing the *dippers* in the exercise of their *right or employment*, and a *real damage* in depriving them of some *gratuity* which they would otherwise have received, perhaps more than they might truly deserve for their labour and pains; besides an action upon the case will lie for a possibility of a damage and injury; as for persuading *A.* not to come and sell his wares at the market of *B.* the lord of the market may have this action.

2dly, It was said that this is not such an *office or employment* for which an assise would lie, and therefore this action will not lie; in answer, we think this may be an *employment for life* determinable upon misbehaviour; and if so, it is a freehold, has a certain place where it is to be exercised, and may be put in view to the *recognitors*; however we think it such an *interest or employment* that an action upon the case will lie against a stranger for a disturbance therein.

3dly, It was said that no notice was given previous to the holding of the court baron on the 26th of *May*, of any intention to appoint *dippers* there, which ought to have been done; in answer to this it is stated in the declaration that the *dippers* were *chosen and approved* at that court baron; and Mr. Justice *Clive* has reported that it was proved at the trial, that the usual notice of holding the court baron was given; it is the court of the *freeholders* who are the judges thereof; the *steward* is only their *prothonotary*, and notice is never given of any particular business to be done at a court baron; if any body is to give notice it must be done by the *freeholders*, for it is their court, and they are the suitors thereof. What? must the *freeholders* give notice to the *freeholders*? it is nonsense to say so; and perhaps the greatest part of them may be dispersed all over *England*, or many

many of them may be abroad in other countries. But here is the *act of parliament* which gives them all *notice*; so we are of opinion that *notice* of this particular business to be done was not necessary to be given by, or to any body.

4^{thly}. It was said the plaintiffs cannot join in this action. But we think they must join, for although the *dippers* are *severally* intitled to receive for their own several use such voluntary gratuities as the nobility and gentry are pleased to give them respectively, yet with regard to a stranger's disturbing them in their *employment*, they are all *jointly* concerned in point of interest; it is a *tort* as done to them all, like the case of the two mills in 2 *Saund* 243, 416, 417, whereof the two plaintiffs were severally owners, and joined in action against the defendant for not grinding at one or either of their mills, which he was obliged to do by the custom of the manor; the principal objection *there* was that the plaintiffs had joined in *one* action, where it appeared their interests were *several*; *Hales* C. J. and the whole court were of opinion that they might well join in action, for although their interests are *several*, yet the not grinding at either of their mills is one *intire* joint damage to both the plaintiffs, for which they shall have their *joint* action, or otherwise the damages would be twice recovered, if they should bring their several actions. 1 *Vent.* 167, 168. S. C. 2 *Lev.* 27. S. C. this case is directly in point as to this objection.

5^{thly}. It was objected that the plaintiffs ought to have alledged in their declaration that the *dippers* were ready to dip at the wells; but they have alledged that they took upon themselves the said employment of *dippers* at the wells, and that the defendant well knowing thereof disturbed them, &c. that is well enough.

Lastly, It was objected that the *husbands and wives* ought not to have *joined* in this action; in answer to this, it is very difficult to reconcile all the cases in the books touching this matter of *joinder in action*; at present it is sufficient for us to say that this action is not grounded on any contract *express* or implied, but the *husbands* are *joined* to assert the *right and interest* of their *wives*, which has been disturbed and injured by the defendant; whatever be the nature of this *right, interest* or *employment*, it is her own, the *husband* hath nothing at all to do with it, he only *joins* for conformity; it is a stronger case than an action by *baron and feme* touching the *wife's* lands where they must join, 1 *Bulst.* 21. or than the case of a debt due to the *feme dum sola* wherein they must join. *Moer* 422. *Baron* possessed of tithes in right of the *feme*, they must join in the action of debt upon the *stat.* 2 *Ed.* 6. for not setting forth tithes, because the *feme* is proprietor. *Cro. El.* 608, 613. So in the case at bar the *feme* is the proprietor; and if she must join in a case where

side *Bayler v*
Dodsworth
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they need
not in *trichap*

Cro. Car. 4:3.

419.

the

the husband has an interest in her lands, *a fortiori* she must *join* in the present case; they may join in trespass *de clauso fracto* and cutting their grafs, *Cro. Eliz.* 96. and this same point was ruled in the case of *Willy and his wife v. Hawksmore B. R.* that they may *join* in trespass *quare clausum fregit* of the wife's land. Wherever the wife is the meritorious cause she may *join* in action; a very strong case to this purpose is 2 *Sid.* 128. and so is *Cro. Jac.* 77. which was case by baron and feme upon an *assumpsit* for curing a wound by the wife, and alledged *in facto* that she cured it, resolved she was the cause of the action, and so the action brought in both their names was well enough. The case of *Holmes and wife v. Wood* (argued in *Mich* term 3 *Geo.* 2. but not determined till *Easter* term following) was an action upon the case wherein the plaintiffs declared upon a *quantum meruit* for a cure done by the plaintiff's wife; and upon another count for medicines and plaisters found and provided for the defendant; upon a general demurrer it was objected that the wife could not *join*, for that she was not the sole cause of the action because the *medicines and plaisters* were the husband's own property, and the damages could not be severed; and of *that* opinion was the court; but they said that if the action had been brought for the labour of the wife only, she might well have joined.

Carth. S. P.

The END of the SECOND PART.

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- Imprisonment, the defendant justifies under a *capias* in *debt* in a bafe court, without shewing that a summons issued, and well enough. 5. b.
- Debt upon a bond to save the parish harmless from a bastard; *pl a non damnificatus*, replication that plaintiff paid 5*l.* rejoinder that the defendant maintained the child; verdict for the plaintiff, objected in arrest that it did not appear the bastard was born in the parish, but over ruled. 5. b.
- + Nil debet to a bond is bad upon a general demurrer. 10. b.
- Debt on a bond to save the plaintiff harmless from expences by reason of naming a clerk to a curacy, or from suits by reason thereof; *plea non damnificatus*; replication assigns for breach that the plaintiff was obliged to pay such a sum by reason of such nomination, but doth not say how he was obliged, and held well enough upon a demurrer. 11. b.
- An attorney pleads *non assumpsit* as to all except 1*l.* 3*s.* 8*d.* and as to that sum, that he is liable to be sued for it in the county court of *Middlesex*; plaintiff replies that the defendant is privileged from being sued there; upon demurrer judgment for the plaintiff. 42. b.
- + A term for 500 years must be pleaded to be by deed. 49. b.
- Trespass by the lord against commoners for digging up coney-burrows, plea a special justification to abate nuisance, demurrer, judgment for the plaintiff. Page 51. b.
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- Whoever claims an *easement* must plead it specially. 173. b.
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- Where matter pleaded under a *videlicet* is or is not material. 335. b.
- The plea of *nul tiel* record must be signed by a serjeant. 74. b.
- Declaration and pleadings in *quare impedit*. 174. &c. b.
- Quod cum*, &c. in trespass is well enough upon a special demurrer. 203. b.
- Leave given to withdraw the general issue in trespass and imprisonment, and to plead a special justification upon terms, and waving privilege of parliament. 204. b.
- In *assumpsit*, defendant pleads his privilege of a 60*h* clerk in chancery, plaintiff replies that the defendant was discharged out of prison upon the insolvent debtors act, and assigned his office to the clerk of the peace for the benefit of his creditors, upon demurrer, judgment for the plaintiff; plaintiff;

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Scire facias to shew cause why the plaintiff should not have execution on a judgment; the defendant *pleads* that the plaintiff "ought not to have his action", instead of *ought not to have execution*", and held well enough on *demurrer*. 251. b.

The court refused to permit a defendant to add the plea of the statute of limitations, upon an affidavit that the defendant's attorney was not instructed what to plead at the time when he pleaded the general issue, in an action for deflowering the plaintiff's daughter *per quod servitium amisit*; this plea is not to be favoured, because it does not go to the merits, but excludes them.

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The title of a declaration made agreeable to the truth of the fact, to let in the defendant to plead a dilatory plea, *viz.* that Mr. *Wilkes* was outlawed. 256. b.

Debt upon an arbitration bond, defendant *pleads no award*, plaintiff *replies* and shews an award to pay 16 l. 10 s. and costs, &c. and assigns a breach for nonpayment of the 16 l. 10 s. only, and good. 267. b.

Replevin for taking the plaintiff's cattle; *avowry* that the defendant took them *damage feasant*; *plea in bar* that the place in which, &c. is part of *East-field*, that the plaintiff is seised of 10 acres of land in *B.* and claims right of common in *East-field* for a certain time, and put in her cattle; the defendant *replies* that there are in *B.* two fields, *East*, and *West field*, and that the owners thereof intercommon while they lay uninclosed for a certain time, that there is a custom to inclose, and that such inclosure is freed from common of any other person, and that the person so inclosing, thereby frees and discharges all the uninclosed, from all common in respect to such land inclosed, that he inclosed the place in which, &c. whereby all the uninclosed lands were freed from his right of common, and that the place inclosed ought to be free from common

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common of any other person, and that the cattle were there of the plaintiff's own wrong after the said inclosure, doing damage; *the plaintiff rejoins* that she put in the cattle till the defendant took them of his own wrong, and *traverses* the custom to inclose; upon which traverse issue is joined, verdict for the plaintiff; a new trial ordered for misdirection of the judge. *Page 269. b.*

Trespass for breaking and entering the plaintiff's house, and searching for and carrying away his papers; the *defendants justify* under a warrant of a secretary of state, *plaintiff replies, de injuria sua propria*; the jury find a special verdict which sets forth that an information was made before a secretary of state, that the plaintiff was concerned in writing and publishing the *Monitor*; who thereupon granted a warrant directed to the defendants to seize the plaintiff and his books and papers, taking with them a constable, which they executed, and carried them before the *Law-Clerk*, who is appointed assistant to secretaries of state by patent; that the like warrants have frequently been issued since the *Revolution*; that no demand was made by the plaintiff of a copy of the warrant, nor did he bring his action within 6 months after the facts done by the defendants; after two solemn arguments, judgment for the plaintiff, that the secretary of state's warrant is illegal, and that neither the secretary of state, nor the defendants the messengers are within the *stat. 24 Geo. 2. c. 44.* *275. b.*

Trespass for stopping the waggon of the plaintiff, and seizing and taking from the cattle drawing the same a pair of iron geers; the defendant

prescribes for toll through the streets of Gainsborough, in consideration of repairing divers streets *there*, and to distrain for the same; the plaintiff *replies de injuria sua propria*, and traverses the prescription, verdict for the defendant, in arrest of judgment, the prescription was adjudged ill, because it doth not say that he repaired *all the streets there*, and the plaintiff might be passing with his waggon through a street which he did not repair. *Page 296. b.*

Declaration for suing the plaintiff maliciously in an inferior court which had no jurisdiction of the cause.

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Declaration for a malicious prosecution upon an indictment. *310. b.*

In trespass for impounding the plaintiff's cattle and keeping them in the pound so closely confined together that by reason *thereof* one of the beasts died; the defendant *pleads* the general issue, and *2dly*, justifies that he took them damage feasant; the plaintiff *replies de injuria sua propria*; the jury found for the plaintiff upon the general issue, and gave the value of the beast in damages; upon the other issue they found for the defendant; adjudged that the dying of the beast in the pound is only *Gravamen*, and need not be answered in trespass; judgment for the defendant. *313. b.*

Declaration for a *misfeasance* and *negligence* against a person employed by the plaintiff to navigate his boat with malt in it from such a place to such a place, and a count in *trover* joined. *319. b.*

Declaration in a special action upon the case against an attorney for *negligence* in the duty of his office, in not causing a person in prison at his client's suit to be charged in execution

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- tion, by reason whereof the prisoner was discharged by writ of *superfedeas* Page 325. b.
- + Debt, on a bond; the defendant's plea confesses that the bond is his deed, but that before the 25th of *October* 1760, he was a fugitive, and in *February* 1762, returned to take the benefit of the insolvent debtors act; that before the act he was indebted to the plaintiff in the sum in the condition, who arrested him for it before he could take the benefit of the act, and being in prison in *November* 1762, executed the bond and was discharged, that on 21st of *February* 1763, he surrendered himself to the King's Bench prison, and in *March* 1763, was discharged at the sessions under the insolvent debtors act, whereupon he prays judgment, and that his person may be discharged from the execution of the judgment; upon a *general demurrer* judgment was for the plaintiff, because the defendant had not surrendered himself and taken the benefit of the act within a reasonable time after his return from abroad, but was arrested and continued in gaol five months, when he might have had his *habeas corpus* and surrendered himself in order to take the benefit of the said act, much sooner than he did. 332. b. 333, &c. b.
- + Debt upon a bond, with a condition, for the payment of 350*l.* in one month; the defendant prays *oyer* of the bond and condition, and pleads that it was given and executed upon a *wicked and corrupt agreement*, to stifle a prosecution for perjury against five persons, and concludes therefore it is void in law. Upon demurrer this was adjudged a good plea. 341. b. to 347. b.
- In replevin, the plaintiff declares for taking his cattle at *M.* the defendant pleads *non cepit modo & forma*; the plaintiff at the trial proved the cattle were in the defendant's custody at *M.* and the defendant proved they were originally taken at *H.* judgment for the plaintiff. Page 354. b.
- + Where the defendant pleads a sham plea, the court will not give him leave to withdraw it and plead the general issue. 369. b.
- + Covenant for payment of money cannot be pleaded to be discharged without deed. 376. b.
- + In what case *accord* and *satisfaction* must be pleaded to be by deed. 86. b.
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- Assumpsit* lies for petit customs. 95. b.
- + *Trespass* for impounding the plaintiff's mare; the defendants plead *damage feasant* to the king in his forest of *Waltham*, the plaintiff replies and shews his right of common in the place in which, &c. the defendants rejoin that the mare was mangy and doing damage, and therefore they took and impounded her, because she was wrongfully and unlawfully in the forest; the plaintiff surrejoins and traverses that the mare was wrongfully and unlawfully in the forest; the defendants take issue on the traverse, demurrer and joinder; the defendants rejoinder is a departure from their plea. 96. b.
- + 97, &c. b.
- + Whoever makes the first fault in pleading shall have judgment against him. 100. b.
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- Nul tiel record* is replied to a plea of a recovery in *B. R.* pleaded in bar, and concludes with an *averment*, held good. Page 113. *b.*
- † The practice, as to being bound to plead issuably an order of a judge. 117. *b.*
- Declaration in *dower*; defendant pleads two pleas, 1st, *ne unque accouple*, &c. 2d, *ne unque seisse que dower*, plaintiff replies to the first plea, a decree in the court of *arches* that the demandant was the wife, and is the widow, of *Y. R.* and joins issue as to the 2d plea: the defendant demurs to the replication to the first plea; and plaintiff joins in demurrer; *venire facias* is awarded on the issue, and continuances on the demurrer, and final judgment is entred for the defendant upon the demurrer; no respect being had to the issue joined to the country. 118, &c. *b.*
- Copyhold lands must be pleaded to have been demised and demisable time out of mind by copy of court roll, and a copyhold cannot be created within the time of memory. 125. *b.*
- Debt on a bond to indemnify the plaintiff from charges of a bastard child; plea that the mother took the child away, replication that it hath since become chargeable to the parish, and the plaintiff hath been obliged to pay, &c. rejoinder that the child was in the mother's keeping, and that it was not in the defendant's power to take it from her, the plea held bad on demurrer, judgment for the plaintiff. 126. *b.*
127. *b.*
- Covenant upon a lease made by the committee of a lunatic, will not lie for the committee, because he cannot (by law) make such a lease. 130. *b.*
- Assumpsit to pay plaintiff 2*l.* per cent. to procure a purchaser of the plaintiff's place of surveyor of the baggage of the port of *London*, is bad, and contrary to the statute against the sale of offices. Page 133. *b.*
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- In a plea *puis le darrein continuance* that defendant became a bankrupt, &c. it must be alledged that he hath conformed, &c. 139. *b.*
- Assumpsit against the defendant for money lent to a third person is bad, even after a verdict. 141. *b.*
- Want of pledges cannot be taken advantage of in error brought upon a judgment by *nil dicit*. 142. *b.*
- Covenant, as heir upon a lease for years, and assigns for breach the want of repairs, defendant pleads that the lessor was only tenant for life, and traverses that the reversion was in him and his heirs; this is well pleaded. 143. *b.*
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- ✓ Whether plene administravit be a good plea in covenant against executors where the breach is for nonpayment of rent incurred in their own time. 4
- + Debt on bond to indemnify plaintiff for what beer he should deliver to J. S. plea that the plaintiff delivered no beer to J. S. after the making the bond; replication that he did deliver beer to such an amount, without saying before the filing of the bill, is well enough, on a general demurrer. 5
- + Debt on a bond, plea *per dures*, replication that the defendant executed the bond of his own free will, and that he did it not for fear of imprisonment, and concludes to the country, is good. *in law* 6
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- + A sham plea is not considered as a special plea. 29
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- + A profert is not necessary of the assignment of a bail bond, nor is it necessary to set out the witnesses names thereto in the declaration. 121
- + Debt upon an arbitration bond, plea no award, replication shewed an award and assigned breach in non-payment of 16*l.* 13*s.* rejoinder that there were other matters pending of which the arbitrators took no notice; this is a departure. Page 123
- Debt upon a bond to prosecute error in the *Hustings*, and to pay damages and costs if judgment be affirmed, plea that the writ was prosecuted with effect and that the judgment is not yet affirmed, replication that the writ was *nonprossed* in the *Hustings*, demurrer, and objected that it does not appear before whom the *Hustings* were holden; 2*dly.* that it is not shewn that the writ is returnable, but over-ruled, and judgment for the plaintiff. 123
- + Assumpsit, the declaration of *Easter Term* 18 Geo. 2. Plea of tender (of the same term) before the exhibiting the bill; replication that the plaintiff sued a *latitat* anterior to the tender; rejoinder admits the cause of action accrued before the filing the bill, but denies that he promised before the *latitat* was issued; demurrer. *per Mr. Abbott.* 141
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WHETHER by institution to a 2d benefice, and before induction thereto, the 1st benefice becomes so void that the patron must present thereto within six months, without notice: Resolved that *lapse* shall not incur without notice; but that *lapse* shall incur without notice unless the patron presents to the first within six months after induction to the 2d benefice; induction amounting to notice. 174. b. 175. b. 176. b. &c.

A. B. being seised in fee of the advowson of a *donative*, the church becomes void, and while it is so he dies; the *turn* goes to the heir and not to the executor; otherwise in case of a *presentative* living. 150. b.

See Pleas, &c. 233, &c.

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Recovery.

A Common recovery was suffered of an advowson in *gross*, and an acre of land upon a writ of *entry sur disseisin in le poſt*, and good. 116. b.

Tenant in tail by purchase *ſecundum formam doni ex parte maternâ*, with the reversion in fee *ex parte maternâ*, by descent suffers a recovery to the use of himself in fee, the lands shall descend to his heirs *ex parte paternâ*. 2, & 66

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The vouchee dies before the return of the summons <i>ad warrantizandum</i>, the recovery is void. <i>Page 35 & 42</i>	It cannot be referred to compute how much a parish is damnified by a bastard child. <i>Page 6. b.</i> Remainder Contingent. 106
A recovery found by special verdict without any writ of seisin awarded, is bad, is no bar, and a <i>ve. fa. de novo</i> shall not go. 55	Remittitur.
If tenant in tail mortgages for years, and suffers a recovery afterwards, <i>that</i> shall let in the mortgage and all other incumbrances whatever made by himself. 276	In trespass against several, and several damages, judgment may be <i>de melioribus damnis</i> with a <i>remittitur</i> as to the other. 30
Why, and when common recoveries were first introduced? 73	Rent.
Whoever endeavours to explain common recoveries upon any other principle, than that they are now become common assurances will run into absurdities. 73	A rent cannot issue out of a term for years, <i>i. e.</i> if lessee for years assign his term he cannot distrain for rent. 375. b.
To say they were excepted out of the <i>statute de donis</i> is absurd, for it destroys the very end and intent of that statute 73	Replevin.
And the recompence in value to the issue is a mere fiction; and no body pretends it extends to a remainder man, who is equally barred by a recovery. 73 See Tail. Copyhold.	If the plaintiff be nonsuited for want of a plea in bar to the avowry the avowant may either execute a writ of inquiry of damages, or sue upon the replevin bond. 41. b.
Rector.	Avowry for rent for an enjoyment of land under a parole demise, plea in bar that the defendant <i>nil habuit in tenementis</i> held to be bad upon demurrer, since the <i>Stat. 11 Geo. 2. c. 19.</i> 208. b.
The fee of the church is in the rector, and he can hinder a lecturer from preaching in his church. 15	Whether a replevin below, can be pleaded in bar to trespass in C. B. 87. b.
Reference to the Master.	Nonsuit in replevin for want of a declaration, the avowant executed a writ of <i>inquiry of damages</i> after a writ of <i>second deliverance</i>, and good. 116. b.
Covenant for nonpayment of rent, and not repairing, referred to the master as to the rent, and upon payment thereof process to stay as to the rent in arrear. 75	See Pleas, &c. Judgment.
Principal and interest on a mortgage referred, tho' objected the mortgagee or had agreed to convey absolutely. 80	<i>If the Deft pleads Non Caput it is sufficient for the Plf to show that he had the Cattle Requested at the Place in the Decd: mentd though he did not originally take them there</i> <i>354. b. Walton v. Kersop.</i> <i>219 Riley v. Parkhurst.</i>

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If a defendant dies after a writ of inquiry of damages be executed and before the return thereof, the *scire facias* must be against his executor to shew cause why the damages assessed should not be adjudged to the plaintiff. 243

Scire facias upon a recognizance against bail—defendants plead that the principal defendant died before the issuing the first *sci. fa.* and before the return of any *ca. fa.* against him.—Plaintiff replies a *ca. fa.* and a return *non est inventus*, and that the principal was then living and long afterwards. Demurrer; judgment for the plaintiff. 61. b.

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The secretary of state, as such, is no *conservator* or justice of the peace; nor is he or the king's messengers in ordinary acting under his warrant within the meaning of the *stat.* 24 *Geo. 2. cap. 44.* 290. *b.* 291. *b*

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